UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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15-CR-637 (KAM)

UNITED STATES OF AMERICA,

Plaintiff,

-against-

MARTIN SHKRELI,

Defendant.

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United States Courthouse
Brooklyn, New York

June 19, 2017
10:30 a.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR PRETRIAL CONFERENCE
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

APPEARANCES

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THE COURT: Have a seat, everybody.

This is oral argument and the final pretrial conference, United States versus Martin Shkreli, 15-CR-637.

May I have the appearances of the parties, please.

MS. KASULIS: Good morning, Your Honor, Jacqueline Kasulis, Alixandra Smith, Karthik Srinivasan, paralegal Gabriela Balbin, an intern for the summer Ari Hoffman and FBI special agents, Michael Braconi and Sean Sweeney for the government. We have a full house.

THE COURT: Thank you. Good morning.

MR. BRAFMAN: Good morning, Your Honor, Benjamin Brafman, Marc Agnifilo, Andrea Zellan and Jacob Kaplan as attorneys of record, Teny Geragos pending admission on the day we start the trial, for the defendant Martin Shkreli, who is who present in the courtroom.

THE COURT: Good morning.

Who would like to be heard first? I think we had some arguments scheduled and before we go into arguments, if you'd like, we can address some housekeeping issues.

Mr. Brafman, you look like you want to be heard, do you want to --

MR. BRAFMAN: No, I wanted to address certain housekeeping issues but I am happy to defer to Your Honor's list.

THE COURT: Well, maybe I can address some of them

now.

I was a little surprised to hear that the trial is now predicted to be up to six weeks long when previously I thought the parties had indicated and I had scheduled a three-week trial. I do have a lengthy civil trial, complex trial starting the last week of July, so I wanted to know whether this new estimate is really a hard estimate and whether the parties really do expect this trial to last up to six weeks.

MR. BRAFMAN: Your Honor, if I may, I think in discussions with the government we, I think, agreed that when Your Honor selects the jury that telling them three weeks would be very conservative. It's always hard to estimate the length of a trial in hard weeks, but I think it would be fair to say given the witness list that we have just been given as modified still involves 57 witnesses I believe and not including the defense case. My guess is four to six weeks is real and that jurors should be told that so they are not surprised.

I apologize, Judge, but the dimensions of this case, once the discovery started to be completed and the government's list of direct witnesses began to grow, I think changed both of our idea of how long we thought the trial was going to take.

THE COURT: Well, that's fine. I just wish somebody

had the courtesy to tell me that before now because I do have similar concerns with a civil trial that involves multiple witnesses and moving parts starting the last week of July.

MR. BRAFMAN: I appreciate that and to the extent we share the responsibility, I would just say, respectfully, that the government's initial witness list began in the 90s, reduced to 75, and it's been further reduced. If it's further reduced, then it may well be we get closer to Your Honor's projection. I just don't want the jurors to be under the impression that come late July they'll be done when we may be beginning the defense case. Some of the witnesses who are on the government's witness list are not on the revised witness list, understandably, and now they are people who the defense will call. So I don't know that we've accomplished much by narrowing it.

THE COURT: So the outside date --

MS. KASULIS: Your Honor, we are --

THE COURT: -- will be --

MS. KASULIS: -- estimating a four week trial in total. Part of the variables are the length of the jury selection, which I think we will also discuss at today's appearance. Separately because the second week of trial is shortened because of the 4th of July holiday.

THE COURT: I regret shortening it, honestly, we should have been working July 3rd.

MS. KASULIS: So we have only three days we're sitting for that week.

We do have a 57 witness list but 14 of those approximately are custodial witnesses. We are hoping to be able to eliminate the vast majority of those through stipulations with the defense and the defense has also provided the government with a 34-person exhibit list with respect --

MR. BRAFMAN: Witness list.

MS. KASULIS: I'm sorry. Thirty-four person witness list to the government. And so between the number of witnesses, the number of fraud schemes and then the variables regarding jury selection and the 4th of July holiday week, we estimate that it will be in total approximately four weeks. We're saying five weeks just to make sure that we don't run out of time. We hope to move our case quickly and have witnesses available so that we're able to, of course, sit full days before Your Honor, but we don't want to be in a situation where we end up really significantly running out of time.

MR. BRAFMAN: I think that's fair and I will add to the equation that we will try our best wherever possible to stipulate so that custodial witnesses are not required as actual witnesses. We would need the outline of the stipulation and the records in question, but we don't intend to challenge the vast majority of the records' authenticity,

so that could speed things up.

THE COURT: So five to six weeks, is that where we are now, or outside five weeks?

MS. KASULIS: I think that's fair, Your Honor.

THE COURT: Well, we're going to make a set of civil lawyers very unhappy about this, but I will have to adjourn this other trial. Five weeks for trial.

The next issue I think that I wanted to address is the questionnaire issue. I don't think that the questions that are being proposed are particularly onerous or out of the ordinary and I don't think we need a separate questionnaire for the jurors. I do think that many of the questions that are being proposed and agreed to by the parties are questions that I would ask the jury anyway during the normal course of voir dire. And I do use a juror questionnaire at the end of all of the general questioning and specific questioning where each juror gets up and states where they live, how long they've been living there, whether they rent or own, their schooling or education achieved, where they work, whether they supervise people and whether any adult members of their household work. I also ask them to tell us about military service and whether any grown children are currently working.

I think a lot of that can incorporate the additional questions that the parties hope to include. I just think that using a separate jury questionnaire where jurors are called in

to fill out questionnaires is going to add time to the process and I'm not really sure why we would need to go through an extra separate written questionnaire.

MR. BRAFMAN: Let me address that. I think this is a joint questionnaire to the extent the Court agrees we can use, I think both parties agree to the questions.

THE COURT: What would be wrong with me just asking the jurors during the voir dire?

MR. BRAFMAN: Let me specifically -- does Your Honor have a copy of the questionnaire?

THE COURT: Yes, I do.

MR. BRAFMAN: I'd ask you, respectfully, to look at questions four and questions five and I believe that an inappropriate answer or prejudicial answer from one juror as to those questions could poison a panel.

THE COURT: I agree with you, but this is what I do, sir, in every case. If I get an affirmative hand raised, we come to sidebar out of the hearing of the rest of the jurors and we explore, through my questioning and counsel's questioning, any follow-up questions.

Would that satisfy you?

MR. BRAFMAN: It would. But I'm not -- it would, but the procedure we had discussed, at least I had suggested, was that if the jurors were called in on the morning of the 26th and given the brief instruction by the Court, perhaps in

the ceremonial courtroom, given the questionnaires, asked them to fill them out and immediately return them, I think the parties between both sides could, by those two questions, in my opinion, figure out who is challengeable for cause on consent. We could then exclude those subject to Your Honor's approval, we could then reconvene several hours later and very quickly resolve the issue. I don't think it delays the process because I think a fair number of people are going to be called sidebar in my expectation and as such that will also take time.

THE COURT: Well, you know --

MR. BRAFMAN: I don't want to fight you on this, Judge, whatever you want to do.

THE COURT: The reason why I just want to say that I disagree somewhat with your approach is, if they did answer questions four and five yes or no, whatever, assume they answer yes, you are going to want follow up and the best way to get that follow up is to have it at sidebar asking them the follow up and if there is a for cause challenge right then and there we will rule on it. I just think it is much more efficient.

Ms. Smith --

MR. BRAFMAN: Okay, but I think the questionnaire provides for the written follow up that if you answer yes, please explain, so a one-line sentence could be put there. I

don't want to belabor the issue, we have enough to do. I will do it any way Your Honor suggests.

THE COURT: I was just going to say that Ms. Smith has been through a jury selection with me before and she's familiar with the procedure of doing it right at sidebar, making rulings right then and there on for cause challenges and then we move on to the next jurors.

MR. BRAFMAN: I'm prepared to accept that, Your Honor.

THE COURT: Because I do think, honestly, if you ask these questions you're not going to get enough information to satisfy yourself.

MR. BRAFMAN: Okay, we'll do it your way. Thank you.

THE COURT: All right. Now, did you all want to talk about anything else regarding jury selection? I was planning to seat four alternates and that would mean that you would be selecting initially from a group of 40 if I add in the strikes and figure out how many we need to end up with. So we have presently 150 jurors ready to come in Monday but I really think that's an overestimate and we are somewhat careful about jury utilization and the cost to the court of calling in far more jurors than we need and so I was going to reduce that number, absent some reason to think that we're going to not have enough jurors, to 130 jurors. I think that

would account for those who are going to be struck for cause and those who may have vacation conflicts or other conflicts.

Does that seem like a sufficient number?

MR. AGNIFILO: I think it's fine, Judge, my concern is -- 130 is a lot of jurors. My concern is once we tell them that we're looking at a five- or six-week trial over the summer, we're going to lose a fair amount. If we run out of the 130, what are our options at that point?

THE COURT: We will just use whatever is left over from other panels.

MR. AGNIFILO: So we won't be stuck, we can recycle through other jurors.

THE COURT: No, we can still go forward. We will ask our jury clerks to hold everybody who has been excluded for cause, but not cause related to conflicts.

MR. AGNIFILO: Right.

THE COURT: Okay.

MR. AGNIFILO: That's fine with us, Judge.

THE COURT: All right.

MS. KASULIS: Your Honor?

THE COURT: Yes, ma'am.

MS. KASULIS: May we raise the possibility of having six alternates instead of four. I'm just concerned considering the length of the trial and it being in the middle of the summer and there will be a lot of attention on this

trial and I do think there may be some risk of losing some jurors throughout the process and so we, respectfully, request six alternates instead of four.

MR. BRAFMAN: We'll leave that to your discretion, Judge.

THE COURT: We will have six then, six alternates in addition to the 12.

MR. AGNIFILO: Can I ask a logistical question? Where we would put the alternates, do we have enough space?

THE COURT: We sometimes put chairs in front of the jury box and have jurors one through it will probably be six in the first row of chairs, and then have the rest sit back. Now it does present a little bit of a problem for the screens, but we will have the large screen down, hopefully we can get enough -- we will have enough seats for everybody.

MR. AGNIFILO: Very good. Thank you, Judge.

THE COURT: I want to confirm that the parties -- is there anything else?

MS. KASULIS: No, just I'm sorry, Your Honor, in terms of logistics, where we'll be meeting and what time you would like the parties to appear for jury selection.

THE COURT: Okay, good point. 9:00 a.m. Monday morning and on every day thereafter you should appear also at nine and we will put the jurors in the box by 9:30. We take one mid morning break at around 11. We take our lunch break

between 12:45 and 1:45 or less if we're pressed and then we have a mid afternoon break somewhere around 3:30. I would like to sit at least until 5:30. We will sit on Fridays. And I think that's it for scheduling.

MR. BRAFMAN: Could I ask you, Judge, where on Monday should we be coming here --

THE COURT: Yes.

MR. BRAFMAN: -- or the ceremonial courtroom?

THE COURT: We are going to think about that. I will issue an order or let you know whether it's here or the ceremonial courtroom. The problem with the ceremonial courtroom is we don't have computer access there.

MR. BRAFMAN: I meant just for the selection.

THE COURT: Right, I know. I just want to look at this courtroom more carefully and see if I can fit 130 jurors here without difficulty. The spectator part where most jurors sit is a lot smaller on this side than it was on the other side so we may not fit 130 folks in here.

MR. BRAFMAN: As a personal courtesy, can I ask we end at 5:00 o'clock on Friday instead of 5:30?

THE COURT: Can we play it by ear?

MR. BRAFMAN: Yes.

THE COURT: I would like to go to 5:30 if we could.

MR. BRAFMAN: All right.

THE COURT: I want to confirm we have everything

resolved regarding the Retrophin privilege log, correct?

MR. BRAFMAN: I think we do.

THE COURT: No issues? Okay, great.

MR. AGNIFILO: We don't see anything to bring to the Court's attention, we're having a productive dialogue with the Retrophin.

THE COURT: I appreciate that, good, thank you.

There's a bail modification request --

MR. BRAFMAN: Yes.

THE COURT: -- I understand. I understand the government opposes. I'd like to hear more about this and I also feel I would want more verification as to where this money is going and who has billed Mr. Shkreli and how it's going to be spent. My concern is that we have reduced already I think once the bail and I'd like to hear from the parties.

MR. BRAFMAN: Your Honor, the bail was never reduced. The bail was changed from stock to cash so it's all liquid in an E*Trade account, but it was never reduced from the original 5 million.

THE COURT: All right. I understand that you want to pay $3 million collectively to accountants, tax -- federal and state tax authorities and attorneys, correct?

MR. BRAFMAN: Yes. And, Your Honor, I will represent to you and then I can have Mr. Vernick, who is a partner at Fox Rothschild, who will be the custodian of the

money if it's reduced. And what we are seeking is, because of the IRS liens, if you will, we are in a position where even if Mr. Shkreli had funds, and he doesn't, he would be prohibited from using them. And the understanding would be that the $3 million would be paid as follows by Fox Rothschild and all of the money would go to them, maintained in their escrow account with the understanding that none of it goes to Mr. Shkreli.

It would be used in the following manner: A million 250,000 dollars would be paid by that firm to New York State Tax Department and we've been advised that if that payment is made, that they will then lift the lien permitting the lawyers and accountants to be paid from some of this money.

A million dollars would go to the Internal Revenue Service, again directly from Fox Rothschild.

$50,000 will go to Marks Paneth, who at this point, Your Honor, is providing both forensic accounting services and also have cleaned up Mr. Shkreli's tax issues by filing amended returns and trying to get the tax that the government claims is owed to be reduced and he has been successful. They are owed close to a half million dollars. They are willing to take $50,000 on account now. That money would go to straight to Marks Paneth.

Fox Rothschild, the number I have for them now, is $326,085 but that keeps growing every day because they are

essentially handling all of the litigation that Mr. Shkreli has at least keeping it in place. They were the ones who negotiated the payment of part of the legal fees through the Retrophin indemnification agreement, which took many months for them to do.

Mr. Shkreli is still worth a lot of money in terms of his share of Turing, but based on what Mr. Vernick has advised me, Mr. Shkreli is not able to sell his share of Turing, which may be worth as much as 30 to $50 million.

THE COURT: Why is that?

MR. BRAFMAN: Because it is not a public company and it is a partnership that has a restrictive partnership agreement that requires the consent of all of the partners. They would require years of litigation to get this done. He's not allowed to pledge that share either as collateral for any type of loan nor could he post it as bail. And Mr. Vernick is the person who has been handling all of those legal issues and there are motions pending with respect to the Turing board to have the board replaced, that involves litigation in Switzerland, Your Honor.

So what's happened is, as a courtesy to me in a sense, Marks Paneth and Fox Rothschild have continued to work and I'm getting to the point where I can't in good faith continue to ask them. The balance -- and there may be a couple of hundred thousand dollars, we are already out of

pocket, our firm, a fortune of out-of-pocket expenses because it's a boutique firm and in order to produce and reproduce and copy and input -- get involved with the downloading from the database these expenses are being borne by us. So none of the money goes to Shkreli. His bail is twice -- it would be still twice the bail of Mr. Greebel.

Mr. Shkreli has no criminal record. All of his family lives in New York City and he has so far not violated the terms of his bail, and he is also not a citizen of any other country and the Court has -- or Pretrial Services has his passport, so in the normal circumstances $2 million cash bail is extraordinary in my experience. Mr. Greebel's bail is not cash, it's secured by a house and yet he is, you know, in counts that carry severe penalties as well.

So we're doing this, we tried to work this out with the government and they had said, well, you know, your client tweets about willing to pay someone a hundred thousand dollars. I said, look, you know, tweeting has become, unfortunately, still fashionable and when people tweet they don't always mean what they say and he hasn't made any payments. We have an affidavit we've prepared to provide that Mr. Shkreli does not have any foreign bank accounts, which is the request they initially made. Now they want him to fill out the usual Eastern District 40-page financial affidavit. I can't let him do that.

One of the things I've learned from this discovery is that he really doesn't have a handle on what companies he once had an interest in and where that interest lies. He doesn't have any cash. We could give you an affidavit saying he doesn't have any bank accounts, he doesn't have any present balance anywhere and that the only asset of value that he has is the Turing stock, which he cannot use.

In addition, the government, when we raised this issue, said, well, your client paid $2 million for a record album which is now, quite frankly, almost worthless; he did. And maybe it was absurd to do that but he did it at a time when his KaloBios stock was worth $50 million and now it's not.

Bail was never negotiated in this case. The Arnold & Porter firm agreed to $5 million in KaloBios stock when that stock was worth $50 million. The stock is virtually worthless now, he doesn't own it any more, and we have $5 million cash sitting in an E*Trade account that if Your Honor releases it it will go directly to Mr. Vernick. So if you want me to give you an affidavit from Mr. Vernick affirming everything that I've said to you, I'm happy to do that. But it just seems to me that it's sort of cruel and unusual punishment to make all of the lawyers who are working 24/6 and sometimes 24/7 on this case, and turning out hundreds of thousands of copies of discovery over and over again, for those of us who need hard

copy, to continue to lay out money.

I just spoke to the reporter about a daily copy. They want an advance deposit for the trial and that's standard and if I have to I will pay it. I just don't want to keep doing that because it's, quite frankly, not fair especially if this money is just sitting there.

I doubt that anybody can make a good argument to the extent that he poses a risk of flight, most respectfully, and never could make that argument and he's recognized everywhere he goes. So he's come here, we've worked our collective heart off to get this trial ready and we're going to be here. He's always on time. So I don't know what else I can say.

THE COURT: All right. I'll hear from the government.

MS. SMITH: Your Honor, there are three separate reasons why the government has not consented to the proposed bail reduction. We've actually been having discussions with defense counsel for at least eight months around the idea of a bail reduction and, you know, I think these three reasons haven't changed during that time period.

I also just want to make clear that the E*Trade account has $5,994,000 in the account, the $994,000 above the 5 million-dollar bail. Your Honor filed a letter permitting the release of that money or an order on October 25th, 2016. So the government does not oppose that $994,000 leaving the

E*Trade account, in fact, there is an order already in place to allow that. The objection is to any reduction below the five million dollars.

So the three reasons why we haven't consented is first, as Mr. Brafman said, the defendant refuses to fill out the standard Eastern District financial affidavit that every defendant seeking a bail modification or reduction in forfeiture needs to fill out and that affidavit would disclose and attest to his assets outside of the bail package.

Second, in direct contrast to what Mr. Brafman is saying here, the defendant has made recent public statements suggesting that he not only has plenty of liquid assets but that he's spending those things on things other than legal expenses and rent. In addition, public filings --

THE COURT: Like what kind of expenses, are they large expenses or --

MS. SMITH: So we have a series of articles, some of them just last week Mr. Shkreli said that he was going to pay $40,000 to a Princeton student for solving a theorem, a geometric theorem towards a scholarship.

A couple of weeks ago he offered a hundred thousand dollars to find the killer of an individual named Seth Rich, who was murdered last year in D.C.

In December, he purchased another album, an exclusive album from Lil Wayne similar to the Wu-Tang album.

We don't know how much he spent on that.

There are articles where he's apparently purchasing domain names of reporters who write articles about him and that he not only would have to purchase the domain name but then maintain it. So there are a number of, you know, public expenditures that he said he has made. Mr. Brafman has said to us that those may be false, but particularly given those public statements it's very important for us to have a sworn affidavit to understand what is true and what is not true.

Retrophin has also said in its public filing, there was a 10-Q that was filed on May 5th, 2017. In the 10-Q Retrophin disclosed that Mr. Brafman has been advanced $4.8 million in legal fees; 2.8 million in pretrial expenses; $2 million in trial expenses. And so we do understand that there has been a significant amount of money in connection with the D&O insurance with Retrophin because Mr. Shkreli was the CEO.

THE COURT: So this is money not Retrophin, but the D&O insurance covered.

MS. SMITH: Actually, Retrophin advances it and the D&O insurance will reimburse part of it. I have a copy of the 10-Q with that highlighted for you, if you'd like, as well as the articles detailing Mr. Shkreli's various statements about monies that he's expended.

I also want to talk about the government's

understanding of the defendant's assets. At the time of the Pretrial Services report, Mr. Shkreli disclosed he had more than $70 million in assets, that was the reason why we asked for a 5 million-dollar bail. I know Mr. Brafman has talked about Mr. Greebel's bail. Mr. Greebel's bail was $1 million, which is a much larger percentage of his assets than $5 million was of Mr. Shkreli's assets at the time.

THE COURT: This is to Pretrial he said he had 70 million?

MS. SMITH: This is to Pretrial with $70 million.

In discussions with defense counsel and also again in connection with public statements that he's made, it's our understanding that the defendant has additional assets that he has not yet liquidated. So that includes an Enigma machine, which is an original Nazi-era German machine. The last public I guess auction of those machines there was one that was sold for $269,000.

He paid $2 million for the Wu-Tang Clan album. He has a Picasso and his stake in Turing, we do not understand why that stake is illiquid. It was at one point offered as a bail asset, so it does seem like at some point it was able to be assigned. There was an article recently that Turing had an offer to sell Daraprim, which is a drug that it had, for a hundred million dollars. It seems to us there may well be a market somewhere for those Turing shares. And we haven't

gotten any information from the defendant. We've asked about any attempts the defendant has made to liquidate these other assets before dipping into the bail money.

And then the last thing I just want to raise is the concern that we have and we've raised this with the defense, Mr. Shkreli has a number of outstanding liens. So there are tax liens from the federal government, from New York State. There was a settlement, I believe it was for $2.6 million with Dr. Kessler. There are additional liens, outstanding debts. The concern that we have is that by releasing money from the bail, from the bank account per the Court order directly to Fox Rothschild, we are circumventing the normal procedure by which -- if the money was just in a regular account and wasn't held for bail, would have to go through whatever the waterfall is of different liens, and there's obviously a legal order for doing that.

THE COURT: The priority of the different liens.

MS. SMITH: Exactly. And so our concern is that the defendant is using this as a mechanism to pick and choose which creditors he wants to pay in which order as opposed to going through the legal process that would need to be gone through. And the government is agnostic as to what that order is, but given the existence of those liens the concern is that we are somehow circumventing the natural legal order of that.

The defendant has had that $994,000 sitting in the

bank account since October 25th, 2016 when Your Honor signed that order. That money could have been used at any point to pay off tax liens or any of these other expenses and it has not been moved out of the account. And our concern is the reason it's not been moved out of the account is because if it becomes available it's subject to whatever that order of liens is. We don't want to be a party to circumventing that.

I, finally, just want to address really quickly Mr. Brafman's point about the original bail package. It was on consent. The arguments that we would have made at the time, however, I think would have been significant. There obviously is always a risk of flight. I actually believe the risk of flight is now heightened. We are now one week from trial, I'm not sure why this application is coming up now, but there is certainly a concern the closer you get to the outcome of a case. Obviously the presumption switches as soon as there is a conviction, so there is a risk of flight concern.

There also is a risk of danger. Our case is going to be about a series of frauds committed by the defendant over many, many years and so --

THE COURT: But how is releasing the money going to enhance the danger to the community?

MS. SMITH: It's more about the money that is left holding Mr. Shkreli here. I know Mr. Brafman has said the Turing shares is somehow going to prevent his flight, but I

really don't understand how that's possible. And again, the concern is that this is another mechanism for kind of getting out of paying people that he owes.

MR. BRAFMAN: Your Honor, can I just respond briefly.

THE COURT: If she's finished. If she's finished. You can respond.

MS. SMITH: I think that's it, Your Honor.

THE COURT: Go ahead.

MR. BRAFMAN: Your Honor, I don't know where some of the government's figures come from quite frankly because while the Retrophin has been kind in terms of willing to pay two-thirds of the legal fees, it's not the number she used. We did not get that number nor is there any provision for Retrophin reimbursing us for out-of-pocket expenses.

The reason the application is brought to force now is because we are paying out of pocket a substantial amount of money that would normally be paid by the client who cannot or by the person who is paying the client's fees and there was no provision in the agreement with Retrophin for out-of-pocket expenses.

I will also tell you that as late as June 16th, which is last week, we were verified that the balance in the account is $5,000,345. I don't know where they get $5,994,000 from. The last statement we have from Mr. Vernick tells me it

is 5 million and 17,000. And the reason Mr. Shkreli cannot use any of his assets, if you will, to even try and sell them is because he owes $6 million in taxes. What the IRS has been willing to do because Marks Paneth, on their own dime, has managed to convince the government that at the end of the day there are a great many carryforward losses that Mr. Shkreli did not take advantage of so his ultimate tax bill may be substantially less. They are willing to take a million dollars now and then permit him to use whatever he can including E*Trade money, to pay legal fees and the accountant fees. Same thing with the New York State tax people. They are owed more than 1.25 million, but they are willing to take that as a good faith payment then work out a payout with Mr. Shkreli.

I also indicate to Your Honor that some of the preposterous promises that Mr. Shkreli has made in recent weeks have never been paid forward and they are still part of his effort, if you will, for him to remain a viable person in his own right traveling to the beat of his very unique drummer, if I may, which will become more apparent when this trial actually starts.

So I'm representing to you, Your Honor, that the only way the Rothschild firm gets paid so they continue to do this, the Paneth firm gets paid and we have made a commitment to the IRS and New York State that if Your Honor releases it

they get paid first. If they get paid first, we will be able to use some of that money to pay Marks Paneth or to pay Fox Rothschild.

I will also tell you, Your Honor, that when he told Pretrial Services that he was worth approximately $80 million, the KaloBios stock was worth 50 million, it's now worth the 5 million that's in the E*Trade account. And Turing was valued conservatively at the time between 20 and $30 million. Mr. Vernick can opine as a legal matter why we can't use Turing either as collateral or why he can't sell it. That's something he told me is absolutely 100 percent right in the partnership agreement.

THE COURT: Why don't you provide that information to the government since they apparently have been in discussions with you for quite sometime and they are still waiting for some answers. If you want to provide documentation from the New York and federal tax authorities regarding the liens and the amounts they're willing to take at this time, Marks Paneth invoices and Fox Rothschild, I think that would be fine. It also I suppose if the $994,000 that was authorized to be released from the E*Trade account is now reduced down by almost $600,000, maybe you can let them know where that went. And I certainly want to make sure that, Mr. Brafman, you're paid.

This 10-Q form does indicate that --

MR. BRAFMAN: It's wrong, Judge. I'm happy to -- it's wrong. Maybe it's, you know, just Retrophin made a mistake and maybe they lumped some Vernick fees or some other fees that they paid, not to my firm. I know exactly what they paid to my firm and I don't usually miss $800,000.

THE COURT: Well, it says the company would undertake an obligation to advance $2 million in future legal fees in the event the matter proceeds to trial. The company has now advanced 2.8 million, 1.8 million of which occurred in 2016 in pretrial fees to Mr. Shkreli's counsel as well as the $2 million in trial fees, so --

MR. BRAFMAN: They are --

THE COURT: -- you're saying that's just flat out wrong?

MR. BRAFMAN: Based on what I know about my firm, yes. I'll try to figure out how this happened and talk to Ian Shapiro. Your Honor --

THE COURT: Let's --

MR. BRAFMAN: -- I'm not going belabor the issue now. I'll discuss it with Mr. Shkreli whether we pursue this matter with the government or we just --

THE COURT: Obviously it would be a good idea to pay tax liens because they generally do have a priority, but I understand the government's position of not wanting to become embroiled in some fight over the priority and who gets the

money first.

MR. BRAFMAN: It's my understanding again -- and this is out of my realm of expertise, but Mr. Kessler is not a preferred creditor. Mr. Kessler is a creditor who would stand in line behind the IRS, behind the New York State and maybe one day eventually have the right to apply for reimbursement. I'm also under the impression that there's been communication with Mr. Kessler's counsel and that he would take a position that he is not a secured creditor.

I'm not aware of any other judgments that would take precedence and I think the IRS and New York State would make that verification before they agree to accept this money. They have priority anyway.

The point is, Judge, he doesn't get any of this money so it's not like we're giving Mr. Shkreli $3 million to play with. We have a breakdown of where it goes and any extra money that's left would go to defray any legal fees or expenses.

THE COURT: Ms. Smith.

MS. SMITH: Your Honor, just to make clear, in the 10-Q it's very clear there were additional legal fees in connection with the short swing civil case that Retrophin was to advance. Mr. Shkreli owed several million dollars to the company in connection with that case and so on the civil side there was a decision that the company wouldn't advance legal

fees and Mr. Shkreli wouldn't pay that debt. That's all in connection with the short swing case and the civil case in the Southern District of New York. It's completely separate from the $4.8 million here. And what I'm hearing from Mr. Brafman is that he was paid $4 million and he's contesting that point eight. But the matter stands that he has been advanced $4 million in connection with this case.

MR. BRAFMAN: Your Honor, just because we're in a public courtroom and the legal fees is not something I generally prefer to discuss, I have most of my firm working around the clock on this case. I have people who are going to be living in hotels close to the courthouse because they can't travel here from New Jersey to be here on time given the state of mass transit or New Jersey PATH. We are spending literally, out of pocket, hundreds of thousands of dollars before this trial is over given the experts that we've had to confer with. So it sounds like a lot of money until you start looking at the number of hours that are consuming everyone's life.

Thank you, Judge.

THE COURT: All right. Well, this is what I'm going to suggest, Counsel. Mr. Brafman, since you've promised several declarations and documentation that you provide it to the government and hopefully we can come to some sort of agreement.

I am a little concerned that there are a number of folks who are owed money and if there are funds or individuals who are not on this list of suggested recipients, it would be unfair to for me to order that they get paid ahead of others. Certainly the legal fees should be paid. I don't know what the numbers are, I'm not asking you necessarily to tell me here and now, but I do think that the only recognizable priorities I've seen here are the state and federal tax liens and if there's a judgment lien then maybe that has some level of priority, but these others I'm not sure what the true numbers are and whether there are other assets that could be used to satisfy some of these outstanding debts.

It appears that there's not a very clear understanding of the basis for the statement that the Turing assets are illiquid. I don't -- perhaps a statement from Turing or some explanation would be helpful in that regard, but I think I would be reluctant to release $3 million just based on some of these unknowns.

I would say I respect, Mr. Brafman, your expertise and your position as counsel for Mr. Shkreli in advising him not to complete the financial statement, but many defendants do when they want to release assets or to come to some understanding with the government and so at some point, I mean this financial statement may become necessary, but it's really up to you and your client as to how you want to proceed.

MR. BRAFMAN: Yes, Your Honor.

THE COURT: Let me just make sure we don't have anything else besides the bail modification.

I think that I will want to hear more argument on this reliance of counsel defense and the other issues in the motions in limine. I do have time set aside tomorrow at 10:00 o'clock a.m. for a hearing if we go down that road. I know that, Mr. Brafman, in the past you've said that having such a hearing so far in advance of trial would be disadvantageous, I have rescheduled everything tomorrow to make time starting at 10:00 o'clock a.m. for a hearing if we need to proceed in that direction.

MR. BRAFMAN: I don't think we will need to. I think we have notified the government, and if not we'll notify them now and Your Honor, with respect to Counts One through Six, the only counts in which this issue is questionable, we have conceded that Mr. Shkreli will not argue or seek reliance on counsel charge with respect to Counts One through Six. I do believe we told the government this in the last day or two but it's something that we have discussed and Mr. Shkreli agrees and we will not be seeking reliance on counsel defense with respect to Counts One to Six. I think the government has conceded, I won't put words in their mouth, that we have a right to argue reliance on counsel with respect to Count Seven, which is the Retrophin count and Count Eight which is

the Fearnow count and whether or not you ultimately give that charge is something I think Your Honor needs to decide until after you hear that testimony.

I will say that with respect to Counts One through Six, we will not be arguing that Mr. Shkreli relied on the advice of any lawyer with respect to those counts. There is interaction with Mr. Greebel that will come into the case because there are conversations he has with MSMB investors and consultants and prepared settlement agreements, but we're not going to be taking the position that the reliance on counsel with respect to those counts. I don't think a hearing is necessary.

THE COURT: All right, well, I am happy to hear you're trying hard to resolve issues between yourselves. I guess in that regard, and this may be part of the argument, maybe I should just go more methodically through the various motions.

There was some issue you might be calling Mr. Greebel.

MR. BRAFMAN: We're not going to be calling Mr. Greebel.

THE COURT: All right, thank you. So should we address first then your motions in limine, Mr. Brafman. I understand that you had and have continued to try to narrow some of the statements --

MR. BRAFMAN: Yes.

THE COURT: -- that you were in disagreement over. If you could start with those that were still issues I'd appreciate it.

I think you had objected -- I'm looking at your May 31st letter to certain statements set forth in the second paragraph under the heading "Overview."

MR. AGNIFILO: I'm going to handle this motion.

THE COURT: I'm sorry, that's fine.

MR. AGNIFILO: Thank you, Judge. What we've done, we've spoke with the government on Friday and reached some agreement as to some of the statements, then quite frankly I went back over the weekend and I can even --

THE COURT: Will you then just tell me which ones are still in issue? Again, I'm referring to paragraph 2 of your May 31st letter under the heading "Overview."

MR. AGNIFILO: Yes.

THE COURT: Which --

MR. AGNIFILO: So one through eight we agree.

THE COURT: One through eight.

MS. SMITH: Your Honor, we filed a chart on June 15th that laid out all of the statements and kind of where we were on each one. It's color coded.

THE COURT: Okay. Thank you.

MR. AGNIFILO: That's the easiest way to go through

it.

THE COURT: That's the most recent iteration of where you are currently?

MR. AGNIFILO: I've even endeavored to be better than that over the weekend, Judge.

THE COURT: All right. I'm ready.

MR. AGNIFILO: So one through eight we have agreement. There is nothing for the Court to decide.

Nine and 10 they are 106 issues. We agree that the statement is generally admissible but in regard to each of them -- and what we've done, Judge, I don't know if this is in front of you, we have -- we attached, I'm sorry to say, a 39-page chart to I believe our initial.

THE COURT: The May 31st letter?

MR. AGNIFILO: I think so. Look at the exhibit, I think it will be --

THE COURT: You want Exhibit 2 where you set forth the additional information.

MR. AGNIFILO: That's it.

THE COURT: So number nine, statement number nine.

MR. AGNIFILO: Right.

THE COURT: This is his statement in the Merrill Lynch.

MR. AGNIFILO: That's correct. So if Your Honor prefers we can go statement by statement, the ones we object

to.

THE COURT: To the extent there is still an issue, so all the red items are still in dispute.

MS. SMITH: That's right.

MR. AGNIFILO: Yes. Let me make it easier right off the bat just so we see what's still in dispute. I am withdrawing the 106 objection to statements 26 through 30.

THE COURT: Twenty-six through 30.

MR. AGNIFILO: Yes. They all relate to a personal loan so they all related to the same subject and rather than seek to add the 106 material that I wanted to add, we're going to accept the government's statements as they initially proposed them.

THE COURT: Great.

MR. AGNIFILO: Then with regard to 34, the same thing. I initially lodged a 106 objection to add material and I'm withdrawing the 106 objection. So 34 is fine the way the government wanted it.

THE COURT: So shall we start with number nine.

MR. AGNIFILO: That's fine, Judge. So number nine we agree the statement is admissible but our contention is that the portion of the statement that the government wants to put in evidence is really only part of the answer. The full answer really continues, and now I'm looking at our chart that we attached to our letter that goes from page 2 onto page 3.

Because he's basically being asked did Rothstein Kass do work for MSMB and he says, well, how do you define work? Then he goes on to explain -- and this is what we get to on page 3 -- is that Rothstein provided tax services to MSMB Consumer LP.

And so our contention, from a 106 perspective, is that the portion that the government wanted to elicit is really only part of his answer and so by keeping out what we have on page 2 and on the top of page 3 really takes his whole answer, which is we contend this is his whole answer --

THE COURT: This is my question though. It appears this MSMB Consumer LP is a completely separate entity and the work that Rothstein Kass provided was more recent, it was only really in April of 2012 after the period at issue here. So I think what we're focusing on is the period where -- set forth in the indictment involving MSMB Capital and MSMB Healthcare. This other entity is a separate entity, it's a hedge fund and a limited partnership and it's a more recent consultation. So that was why I was wondering why it would be relevant to the charges.

MR. AGNIFILO: Well, I guess part of what I'm concerned about is to the extent if you just look at what the government wants in this and not the rest of his answer, the conclusion can be reached that there was no connection between MSMB. And I think part of the problem we have, Judge, this bleeds into other issues is the interrelationship between the

MSMB entities. So my concern is that if we only put in the government's portion of it they might say, well, there was no connection between MSMB and Rothstein Kass where that's not really an accurate answer.

THE COURT: But this question in the Merrill Lynch exchange is focused on the private offering memorandum for MSMB Capital Management LP and it's really a different time, a different entity and a different subject than what is being discussed in this additional information that you wish to add. That's why I'm just not sure whether adding that would A, one be relevant, B, would confuse the jury because it's about a different entity and a different time and it goes to a different issue, which is not the private offering memorandum.

MR. AGNIFILO: Right. I think what you're going to see is -- I think this is borne out in some of the statements that are going to come out in the evidence, is that Rothstein Kass and NAV, the consulting services, he has a relationship with them, but at the end of the day they end up being hired, you're right, a little bit later on. My concern is by taking it out of context it makes it, in effect, clearer but misleading because there is a relationship between the MSMB entities and Shkreli and Biestek with these other entities that I don't think is reflected as accurately if we take only the government's portion. Everything Your Honor said is absolutely right, but I don't think that's the whole answer.

Because there are different MSMB entities and MSMB Capital is having discussions with Rothstein Kass and NAV, N-A-V, and I think that's what the rest of the answer gets at.

So that's our application.

THE COURT: Okay. Number 10.

MR. AGNIFILO: Yes. Number 10 we viewed numbers 10, 20, and 21 as essentially being related and they all have to do with the NAV consulting and the same issue of Rothstein Kass. And what we proposed in our chart, it's a little confusing because we brought the three of them together, but I can make it a little easier.

THE COURT: It's 10, 20 and 21.

MR. AGNIFILO: Yes, 10, 20 and 21 really relate to the same subject matter and on our chart on page 9 -- I'll wait for Your Honor to get there.

THE COURT: Yes, I'm okay.

MR. AGNIFILO: Initially we started what we wanted our fuller answer to be on page 7 in the middle. I don't think -- I don't want make it longer than it has to be, so I'm willing to take everything on page 7 out and I'm willing to take everything on page 8 out.

THE COURT: This is item 21 --

MR. AGNIFILO: Yes.

THE COURT: -- so you'll take out seven.

MR. AGNIFILO: And eight.

THE COURT: I'm sorry, statement 21 on page 7 and page 8.

MR. AGNIFILO: Yes, that comes out.

THE COURT: Okay.

MR. AGNIFILO: So we start on the top of page 9, it's actually the fifth line down, Rothstein sent us an engagement letter.

THE COURT: Starting with?

MR. AGNIFILO: So it's the third line of his answer.

THE COURT: Yes.

MR. AGNIFILO: Rothstein sent us an engagement letter. So we would go down the rest of page 9, because we think that's responsive to the questions that the government wanted.

Now I don't think, quite frankly -- I think page 10 can come out in total. I think our proposed answer would end at the end of page 9. I think the pages 10, 11 and 12 can come out just because I think it's unnecessary.

Now I'm looking on page 13 --

THE COURT: Okay.

MR. AGNIFILO: -- I would say two-thirds of the way down Your Honor might see it says, "We did end up using NAV."

THE COURT: Yes, so everything above that comes out?

MR. AGNIFILO: Yes, except for what we just went through on page 9. It goes right from page 9 to page 13 where

it says, we did end up using NAV, then it goes to the end of that page.

Then our contention is that 14 and 15, those sections, are relevant as well.

THE COURT: I'm sorry --

MR. AGNIFILO: I know it's hard to follow.

THE COURT: -- what did you say?

MR. AGNIFILO: So we're on page 13, we did end up using NAV.

THE COURT: Yes.

MR. AGNIFILO: We finished all the way to the bottom of page 13 --

THE COURT: Right.

MR. AGNIFILO: -- all of page 14.

THE COURT: Do you want to take that out?

MR. AGNIFILO: No, it's all in.

THE COURT: Fourteen and 15 stay in.

MR. AGNIFILO: Yes, that's right.

THE COURT: Got it.

MR. AGNIFILO: Our contention basically is that the whole situation with NAV and Rothstein really isn't captured by the three segments that the government wants. That this is his full answer, it's all on the same topic area.

THE COURT: Well, are you saying, then, that the statements on these additional pages that you do want to leave

in relate to the use of NAV for MSMB Capital Management?

MR. AGNIFILO: Yes. Yes.

THE COURT: For the time frame that is at issue here?

MR. AGNIFILO: It is. Yes, I mean it is -- the problem with the whole state of play here is they're talking with NAV and they're talking with Rothstein and they're seriously thinking about hiring them and both of those entities send engagement letters to MSMB Capital.

THE COURT: But the bottom line is Mr. Shkreli testified he never used them for an entity for MSMB Capital Management. They have not performed any services for MSMB Capital Management, that's at statement number 10. So the fact that they might have been talking or thinking about it or discussing engagement letters is less relevant than the fact that he didn't use them.

MR. AGNIFILO: Right, but I don't think that's the only relevant fact. I think you're right in terms of the line in the sand that Your Honor has drawn it's --

THE COURT: Well, I'm not drawing lines, I'm looking at what the question and the answer is and whether the answer responds to the question, which it appears to do. These other statements are talking about things that might have been discussed but never really occurred in terms of the provision of services by NAV to MSMB.

MR. AGNIFILO: The relevance, looking at it from a different angle, could be this: If I'm asked a question about something that I've done and I give an answer, it might be one state of reality if I never did it and I never had any intention to do it. If I'm making plans to do it, the quality of that statement is different and so I think what the full reality is from what these additional statements show is that there are meaningful steps being made to retain both of these companies. That they were not retained ultimately by MSMB Capital is certainly a relevant fact and a fact that the government is going to make a point of I expect. However, I think we have the right to make a point of the fact that he didn't just pull NAV and Rothstein out of thin air. He was having discussions with them and with an eye toward a business relationship and so that's relevant. There's something in here for everyone. The government is going to say, well, it wasn't final, we're going to say but, yeah, he was talking to them. And that latter part of that is reflected in this part of his answer.

THE COURT: I think what the question was targeting, if I read it correctly, was did you ever use their services. Despite all of the dancing around and the engagements and the attempts to actually have an agreement where they would provide services, it doesn't matter if they never provided services, which is what your client stated under oath, which

is no, NAV did not provide services to MSMB Capital, right? So everything that surrounded that fact I'm not really sure why it's relevant, but I will certainly --

MR. AGNIFILO: That's fine.

THE COURT: -- consider what you've told me.

MR. AGNIFILO: Very good, Judge.

THE COURT: Thank you. What else?

MS. SMITH: Your Honor, I don't know if you want us to respond to each statement or --

THE COURT: Maybe that would be more efficient. Do you want to be heard?

MS. SMITH: I think for both 9, 10, 20 and 21, again the standard isn't relevance. We put in the law about the government gets to put in the defendant's statements because they are a party opponent. The defendant doesn't get to put in his own statements --

THE COURT: Because it's hearsay.

MS. SMITH: You don't get a chance to put in self-serving, exculpatory explanations, after-the-fact explanations. We absolutely understand that Mr. Shkreli is going to say oh, well, I never -- I represented to all my investors I had NAV and I had Rothstein and, yeah, I never hired them, they never did any work for MSMB Capital, but I was thinking about hiring them. That's going to be his defense. That defense he can put in if he takes the stand or

if they have another witness to do it, but they don't get to highjack the government's statements to do that. And the questions and answers we have put in are completely on their face, you know, under Rule 106. And as you said, did this company provide services, no, it did not.

We kept it kind of very tight and trying to add all of this additional explanations from the defendant is not what Rule 106 is for. I think that's the same kind of issue with all four of those statements.

THE COURT: All right. Do you want to go on to, is it number 18, sir?

MR. AGNIFILO: Yes, Judge. So number 18 the government wants -- the question is we're referring to Mr. Austin's investments, Mr. Shkreli, did you ever have trading discretion over any of his money? And his answer was, no, not specifically, no.

Now when someone says, no, not specifically, it's not no. It's no with a condition or it's no with a but. And I think we get to put in the additional information, which is the information we set forth. Because what he does is he goes on for an explanation as to what the relationship is between him and Josiah Austin in regard to Josiah Austin's investments. I think the statement that the government is looking to put in his answer no, not specifically, no, leaves out more than it puts in. Because if the answer is no, he

would have said no. But he didn't say no. He said, no, not specifically, no.

THE COURT: Why is the nature of his relationship from the age 17 or 18 and the fact that this individual's purported to be one of the richest men in the world, why is that completing anything with regard to the response Mr. Shkreli gave just a few lines up?

MR. AGNIFILO: He says -- I'm looking at our chart maybe three-quarters of the way down.

THE COURT: The question is, though, trading discretion over this gentleman's money --

MR. AGNIFILO: Right.

THE COURT: -- not whether they had a good relationship --

MR. AGNIFILO: No, no, no, here he said he executed those trades, fully his discretion, but he never heard of Chelsea Therapeutics until I had mentioned it to him. And after buying eight or 9 million shares of Chelsea Therapeutics he became far and away the largest holder. So that's absolutely explanatory. And that's a fact that I don't think is terribly in dispute, but it's an explanatory fact.

So when Martin Shkreli said, no, not specifically no, the not specifically no part is precisely that statement. And he's giving an example of the nature of the relationship that he had with Mr. Austin. That I think under one -- 106 I

agree with the government it's not a standard of relevance, it's a standard of taking things out of context and it's a standard of putting other aspects of the same statement into evidence at the same time.

THE COURT: Right, but the reason I used the word relevance is because the idea of 106 is that it completes or relates to or makes clear the statement that's being offered. And so if it's a completely different time, place or entity, or something that's not responsive to the question and response that's being given, I think we have an issue that's not really related or necessary to complete the full picture.

MR. AGNIFILO: I agree with Your Honor's assessment entirely, however --

THE COURT: So if the question is, did you have trading discretion over Mr. Austin's money and it's no, not specifically, no, why is the nature and length of the relationship and the fact that he's making suggestions, although not having trading authority over his money, necessary to complete the picture?

MR. AGNIFILO: Because no, not specifically, no, is not a complete answer. And he goes on to say, I'd like to characterize it further if you let me. Because no, not specifically, no, is he obviously has something else in the answer that he wants to say that is the answer to that very question. And he goes --

THE COURT: What he's saying, sir -- I am sorry, I am interrupting you, I apologize. Basically what he's saying is he trusted me, I gave him good advice, he followed my advice and he became a large shareholder of Chelsea Therapeutics. But that is not really part of the question which was whether Mr. Shkreli had trading authority or discretion over his money. He just gave him suggestions. There is a big difference.

MR. AGNIFILO: It might not be part of the question but it's part of the answer, it's absolutely part of the answer. Because he's not comfortable with his own answer. No, not specifically, no. Then he says, I want to characterize it further. That's his answer. They asked the question. The question doesn't admit to an easy answer and Mr. Shkreli is providing the answer and this part that we have here is his answer and he's giving an example to answer the question. And that's what he's trying to do. I think the government -- and 106 is so that statements don't come in unfairly, take things out of context. That's exactly what they're trying to do here. They don't want his full answer. It's not a self-serving answer, it's an answer to the question. He's asked the question, he gives an answer. They want him to say no, not specifically, no, and pretend that's it, that it ends there, but we all know it doesn't end there because we know what he goes on to say. And he goes on to

give a very detailed assessment, giving an example of what he does for Josiah Austin and putting him in Chelsea Therapeutics, which is a full answer to that question.

THE COURT: I just have other problems with the statement that you want to offer. I don't think that anyone can testify that what is in the minds or the understanding of Wall Street generally or Chelsea specifically. He says it's widely understood both on Wall Street as well as at Chelsea for a long time that that investment was my idea, was Joe's money to be certain. He's making a declarative statement about what is in someone's else mind and not even someone else, just Wall Street in general.

So maybe I would consider this if you were willing to redact a lot of what is just really not admissible.

MR. AGNIFILO: I could do that.

THE COURT: Let me hear from the government.

MS. SMITH: Your Honor, again as you pointed out, the question is whether he had trading discretion over Josiah Austin's money. The answer is no. The answer has always been no. We will have Mr. Austin as a witness. The defense is more than welcome to cross the witness on what the other relationship may or may not have been within the balance of relevance. But the question is whether there is trading discretion and the reason that's important is because Mr. Shkreli tried to count Mr. Austin's money as part of the

AUM for MSMB Capital, which he was not permitted to do. He did not have discretion over that money.

That is the question and the answer. The rest of the answer, which I know Mr. Shkreli desperately wants to get into evidence is again, a self-serving, rambling explanation of this relationship which is somehow supposed to create out of thin air the ability for him to count Mr. Austin's money as part of the AUM. And that is why that question and answer is complete on its face and the rest of it is self-serving, exculpatory and not responsive to the question.

MR. AGNIFILO: Your Honor, that response makes my point. His answer isn't no. If his answer was no, we'd be done. He says, no, not specifically, which means there is some other thing that he wants to say to answer the question he was asked. So I understand Your Honor's concern. What I think is the most important part of this is he says -- and I'm looking at my block paragraph here, I'm going about two-thirds of the way down. He executed those trades, fully in his discretion, but he had never heard of Chelsea Therapeutics. That's true. We can contend it's true. Until I mentioned it to him.

So this part, this part here toward the end, I think doesn't get into some of the concerns that Your Honor has. I think it's Mr. Shkreli's way of answering the question. They don't think -- if they want to withdraw this as a statement

and they don't want to get into any of it, they can do that, then I don't have a 106 objection. But they can't do it halfway. I shot the sheriff but I didn't shoot the deputy, one statement, you know, they don't get to break it up.

THE COURT: What's wrong with the suggestion by the government that you ask Mr. Austin when he testifies whether he followed Mr. Shkreli's advice, whether he ever heard of Chelsea before Mr. Shkreli told him about it, and whether he then, based on Mr. Shkreli's advice, bought the shares?

MR. AGNIFILO: Then they should withdraw the statement. If they want the statement, they can't do it this way.

THE COURT: Well, because the statement is addressed to whether Mr. Shkreli had authority to trade Mr. Austin's money.

MS. SMITH: And it is his statement that he didn't. I will note that there is an intervening question. So the question we're referring to investments, did you ever have trading authority? No, specifically, no. There is then another question, separate question by the questioner and then a separate answer which they are try trying to append. And as I put it in my brief, the original 106 also included part of the question before but not the back and forth in the question before. It's really just a way of trying to shoehorn this information into this answer.

THE COURT: All right. Anything else, Mr. Agnifilo?

MR. AGNIFILO: I've said everything I have to say on this particular statement.

THE COURT: Do you want to move on to number 19 then?

MR. AGNIFILO: Yes.

Number 19, I initially had a proposal for a 106 addition, I'm going to withdraw it.

THE COURT: Withdrawn?

MR. AGNIFILO: Yes.

THE COURT: What about 20, sir?

MR. AGNIFILO: Yes.

MS. SMITH: I think 20 and 21 were --

MR. AGNIFILO: We dealt with 20 and 21 with the other one.

MS. SMITH: With 10.

THE COURT: Okay.

MR. AGNIFILO: We're on 22.

THE COURT: Yes.

MR. AGNIFILO: For 22, Judge, they want to put in -- they were my attempt to keep the investors apprised of their account values and my contention with 22 is similar to my contention with the last one, is that he then goes on to say what he attempted to do. He says it was my attempt to keep investors apprised of their account values and then the part

we want to add is he goes on to say how, essentially, he did the accounting. Which, again, I think is his part and parcel of that initial answer and whether it's self-serving or not is not the standard. It is whether a statement is being taken out of its context and 106 is really, I submit, a fairly liberal rule. It talks about fairness, it talks about statements that in fairness come in when other statements come in. So in fairness -- and I know the government cited the Judge Rakoff decision from a couple of months ago, Lumiere -- you're looking for things that are explanatory, things to avoid the statement being taken out of context, partial statements where it's not the defendant's entire answer, the declarant's entire answer, I think that's what we have here, Judge.

THE COURT: Ms. Smith.

MS. SMITH: Yes, Your Honor, the questions and answers that we're including are just, did you create the performance statements that were sent out to investors and did you do it all by yourself, period. There is then another question of how were the statements, you know, how did you arrive at the numbers in those statements, then there is a whole explanation, that is a separate question and a separate issue and we are not putting that explanation in. So I think they are very easily separated.

THE COURT: All right, thank you.

Do you want to talk about number 24?

MR. AGNIFILO: I think we skipped number 23.

THE COURT: I'm sorry, you're right.

MR. AGNIFILO: So 23, they are asking him if he spoke to other investors in addition to Darren Blanton in regard to a trading loss that Mr. Shkreli suffered on February 2nd. And his answer is yes. He says, yes. They say who else? And he then says, I would say all of them. Then what happens is the questioner takes Mr. Shkreli through phone records that have individual phone numbers that he identifies as the people he spoke to. So it's clear that he's trying to remember this, he gives his best guess and he says, I would say all of them. But then to complete the answer, which is really what it is, it's completing the answer is, he's then taken through phone records and he identifies, for instance, the phone number of Ed Sullivan. He identifies the phone number of Josiah Austin. He identifies the phone number of Mr. Blanton, and that's all part of the answer. And to leave it hanging as though that was the end of that issue is misleading and unfair because his answer ends up being backed up by phone records. I understand they don't want the phone records in, they want to try and cut it where they want to cut it, but that's what 106 is meant to prevent.

THE COURT: Well, is it the phone records you really want because Mr. Shkreli's response is to the extent he

recognizes a few of the phone numbers and identifies the individuals with whom those numbers are associated, he doesn't really remember the conversations. He testifies that he just doesn't recall the conversations. So is it the phone numbers you want in?

MR. AGNIFILO: Well, it's more --

THE COURT: Because I don't think that necessarily his lack of recollection about what was discussed would be appropriately admissible.

MR. AGNIFILO: Well, I guess my concern is --

THE COURT: It seems to me you are concerned about the phone numbers, you want those in.

MR. AGNIFILO: My concern is that they're leaving the record very unclear and if I'm right it's actually from another -- there's other testimony we make that clear in our chart where he actually goes through the actual phone records so it's not unclear. I mean -- and he has a recollection about the numbers.

Rule 106 is very clear as a rule that you can talk about different parts of the statement in the same statement or in different statements. It's written into the verbiage of the rule. So my concern is that the way that they're phrasing the question and answer is going to leave a misimpression. And that there is other related statements that the defendant made that provide a better answer to that question.

THE COURT: It seems to me that all that you are offering, though, is sort of this painstaking parsing through each phone number and Mr. Shkreli either saying he does recognize the number and naming the person or entity with whom that number is associated, or saying he doesn't have a clue, and then when asked about conversations he doesn't recall. So I think that to the extent that would not necessarily complete anything beyond the initial Q and A, which is who did you speak to to discuss February 2nd losses, and his statement all of them --

MR. AGNIFILO: Okay, that's fine.

THE COURT: -- that's pretty complete.

MR. AGNIFILO: Okay, Judge.

THE COURT: Shall we move on to number 31?

MR. AGNIFILO: Yes, I withdrew 26 through 30. So for number 31 that's on page 34 of our chart.

THE COURT: Yes, thank you.

MR. AGNIFILO: I believe we start earlier. That the government's proposed statement is sort of two-thirds of the way down of where we start and my contention is that they take it out of context in essence by not putting in the whole answer. Because as -- they want to put in, did you read through this private offering memorandum to make sure that it was accurate with respect to MSMB Healthcare? But this memorandum obviously came from somewhere which is part and

parcel of the answer and he's providing that information in the portion of the statement, the additional portion of the statement that we'd like admitted under 106.

THE COURT: All right, Ms. Smith. If I'm recalling correctly, is this the one that Mr. Shkreli re-purposed? It had been previously drafted by a lawyer in connection with another.

MS. SMITH: Yes, that's correct. The additional testimony we said was actually very misleading because the law firm drafted a private placement memorandum for Elea Capital and then Mr. Shkreli took that private placement memorandum and modified it himself with no additional attorney input, first for MSMB Capital and then he took it and modified it again for MSMB Healthcare. So the statement that we have is basically, you know, did you review the PPM for Healthcare, yes. Did he draft it by himself, yes.

The whole explanation before for the genesis of the document, first of all, we have another statement in that's a detailed statement nine actually talks about how it was drafted for Elea and then he kind of transformed it himself for MSMB Capital. So that idea is already in there and this particular appendage is actually incredibly misleading because it makes it sound like this law firm drafted it for MSMB Capital, which wasn't in fact the case.

MR. AGNIFILO: But I think the rule doesn't talk

about whether it's misleading or not misleading. It talks about things that are incomplete and I think that this is exactly what this rule is.

THE COURT: But Rule 403 does counsel against admitting information that is going to mislead or confuse the jury. So even if 106 may arguably allow it, 403 would prevent it from being admitted.

MR. AGNIFILO: It might be a distinction without a difference because -- I just don't want these statements coming in without the overall appropriate context. And as long as it's clear that Mr. Shkreli got these documents from whether it's Elea or another source and then I think that any conclusions about these is remedied, so it's fine if we don't do it here. I think it also leads us to the next statement number 32.

THE COURT: All right. If you look at number nine, sir, it seems to me the Q and A question, how did you go about preparing it? This is the private offering memorandum for MSMB Capital. He says, I used the private placement memorandum that was furnished to me by my law firm when I created Elea Capital and then he goes on to describe how he used the Cobb and Eisenberg form and then basically revised it for MSMB. So it's in there and the government's offering it under --

MR. AGNIFILO: That's fine, Judge.

THE COURT: -- statement nine. So I think it's addressed.

MR. AGNIFILO: Very good. Very good.

THE COURT: So I'm sorry, sir, you wanted to move on to number --

MR. AGNIFILO: Yes, 32.

THE COURT: Okay.

MR. AGNIFILO: I think it's the same issue and what the government started on, did you revise this document in order to use it as an offering memorandum. And I'm looking at the language who drafted this document, and it says it certainly wasn't me, I would think it was Joe Cobb, but I can't really be sure of that. And my concern with this particular statement is, is for them to say did you revise it, they're essentially eliminating the part where he indicates that where it came from. I mean to revise something means to have something from another source. And in the immediate lines of the statement he's saying what that other source was.

Now I understand Your Honor's point we dealt with that in number nine, but then there is no harm in addressing it again here, I mean where it's in its proper context.

THE COURT: Well, because the question is who drafted this document suggests this document refers to the MSMB entity rather than the Elea Capital, that's why I think it's misleading and it's just confusing. It's out of context.

I think the statement that Mr. Shkreli made was that he prepared the revisions to the original Elea document that was then used for MSMB Healthcare, and the original Elea document that he revised had been prepared originally by Mr. Cobb. But the question who drafted this document, first of all, that is out of context, but the suggestion that one would get from reading that would be it's the MSMB document not the Elea Capital document and as we talked about statement number nine addresses the full genesis of that.

MR. AGNIFILO: That's fine, Judge. As long as it's clear in totality, I'm fine with the statement.

THE COURT: Great.

MR. AGNIFILO: Now 34 we withdrew.

THE COURT: Okay, thank you.

We're now at 37, sir.

MR. AGNIFILO: Correct.

THE COURT: I think we might --

MR. AGNIFILO: Thirty-seven I believe there was an objection to relevance. One second, Judge. Yes, Judge, 37 wasn't a 106 objection, it's an objection to relevance. My concern with this statement -- the best way to go about it, Judge, is the government submitted a 14-page chart that we then put numbers on --

THE COURT: Yes.

MR. AGNIFILO: -- because we only have 106

objections on our chart, but they have all the statements in their chart.

THE COURT: Yes.

MR. AGNIFILO: So on page 13 of their chart is the Rule 37.

THE COURT: Okay, got it.

MR. AGNIFILO: My concern here is, if this were questions and answers here in open court before Your Honor, no one would allow someone to say, I think it probably came from, it might have been written by, it's just not admissible. I think Your Honor's point that 403 still has a place in a 106 analysis, as do the general rules of relevance, he's really not saying anything here. He doesn't know the answer to the question. He's asked for the factual content about this Desert Gateway Form 8K, come from you. And he says I think it probably came from some of my colleagues. I might have written some of it, but at that point Retrophin was already starting to grow as a company, I certainly could have written it and probably did write it. Again, if we were in court and such an answer were given there would be an objection and it would probably be sustained. So I don't think it's any more reliable that it's a statement rather than a question and answer here in open court.

MS. SMITH: Your Honor, I mean we admit statements of the defendant we don't go through the exercise of what

would be admissible in court. There is often language that would be used that's admissible in Court. This is probably or could have goes to weight and the defense is certainly able to argue that that statement means he's not a hundred percent sure about his answer. But that's all that it goes to and there's no case law that suggests that you can't put in a defendant's statement unless it passes all the evidentiary rules that it might be applicable if it was in the courtroom. I've certainly heard witnesses say probably to an answer and that be admitted. Again, it goes to the weight of the answer and the certainty the witness has about the statement, but it doesn't go to admissibility.

THE COURT: All right. Thank you.

(Continued on the next page.)

THE COURT: All right. Thank you.

All right. So should we move on to statement Number 38?

MR. AGNIFILO: Yes, Your Honor. I'm going to withdraw 38.

THE COURT: Okay.

MR. AGNIFILO: 39, we agreed on.

THE COURT: So we're at 40?

MR. AGNIFILO: Yes.

THE COURT: Relevance?

MR. AGNIFILO: It was -- it was relevance.

And it's really -- it's really just the -- just the same objection. And I don't agree with the Government's contention that 403 has no place in a 106 analysis. I think it does. I think Your Honor as the gatekeeper is what Your Honor concludes is -- is reliable evidence. And my concern is that the statement attributed here that Mr. Shkreli in Number 40 has elements in it that are -- are -- are not allowed in testimony because they're not really reliable because he's talking about what other people might have -- might have thought. And I -- I just -- it just doesn't seem to -- doesn't strike me to as a reliable statement. And I think that the general rules of reliability and -- and personal knowledge could make a statement more or less reliable, and so we have a relevance objection to Number 40.

THE COURT: I mean, it is somewhat vague and it is attributing positions and understandings to others. Mr. Shkreli, obviously, doesn't have personal knowledge about what is in the minds of others; what many people believe, whether they were supportive of him or not. I think it is a little bit on the margins of whether it should be admitted to the extent he is trying to talk about what might be in the minds of others.

MS. SMITH: The sentence, "Many people believe...", I understand the objection to that sentence.

THE COURT: So would you agree to take that out?

MS. SMITH: Yes. We can take that sentence out, that's fine.

THE COURT: Would that satisfy you?

MR. AGNIFILO: I'm sorry, Judge?

THE COURT: Would that satisfy you?

MR. AGNIFILO: Yes, Judge, that's fine.

THE COURT: So is it all right as is?

MR. AGNIFILO: It's better. Yeah, I'm satisfied with that.

THE COURT: Okay. Thank you.

Let's move on. Number 41?

MR. AGNIFILO: 41 I'm going to withdraw.

THE COURT: Okay. Number 42, sir?

MR. AGNIFILO: 42 is a -- well -- oh, I guess 42

depends on -- on Your Honor's ruling of the hearing in regards to admissibility of some of the information concerning Mr. Pierotti.

THE COURT: May I ask the Government, is an agent going to testify about this conversation with Mr. Shkreli?

MS. SMITH: Yes. To the extent that we put in statements in the proffer, we have an agent who will testify.

THE COURT: Okay. So this word "threatened," is that a word that the agent used or a word that Mr. Shkreli used?

MS. SMITH: It is -- it is -- I mean, we're going to have to look, but the way it's written down is the way that it was expressed to the agent in the meeting.

THE COURT: All right. Because my concern is we wouldn't want the agent to characterize Mr. Shkreli's actions or words, but rather if it was Mr. Shkreli saying, I threatened --

MS. SMITH: Yes, and it --

THE COURT: -- that would be one thing.

MS. SMITH: In the -- I believe, and I would have to go back and look in the 302, there's some additional context that makes it clear that that word came from Mr. Shkreli, but we can go back and look at that.

THE COURT: If this was an account by the agent of what Mr. Shkreli said about his conversation with

Mr. Pierotti, you would withdraw, correct?

MR. AGNIFILO: If -- yes, if he -- well, no, no. It depends -- and it solely depends on Your Honor's ruling, because one of the unresolved limine issues is dealing with Mr. Pierotti. And if Your Honor concludes that such is not coming into evidence, then this would be within that -- a number of Your Honor's rulings.

THE COURT: Right. But if Mr. Shkreli told the agent, I did -- assuming if I did admit the evidence regarding Mr. Pierotti, if Mr. Shkreli told the agent, I threatened him, you would not have an objection, correct?

MR. AGNIFILO: If you -- if Your Honor lets the Pierotti stuff in and if Mr. Shkreli used the word "threatened," then I don't know that I would have a basis to object.

THE COURT: All right.

Do you want to move on, sir?

MR. AGNIFILO: Actually, Judge, I'm going to -- I'm going to withdraw the last three. I -- I see how Your Honor's analyzing these, and I -- and I -- and I don't think I have a basis to keep these three out.

THE COURT: 45 through 47?

MR. AGNIFILO: 45, 46, and 47, yes.

THE COURT: Okay.

All right. Well, I do not want you to think that I

have made a general ruling --

MR. AGNIFILO: No, no --

THE COURT: -- because I have not.

MR. AGNIFILO: -- no, I -- I don't. But I -- but just listening to Your Honor's questioning, and then I don't think I have a basis to keep it out.

THE COURT: Okay. All right. Thank you.

Now, is there anything I have missed in terms of Mr. Shkreli's motions in limine?

MR. BRAFMAN: Your Honor, there are -- there are a number of issues that we would like some guidance on.

THE COURT: Okay.

MR. BRAFMAN: That I think -- I mean, I'm happy to report that we may be able to shorten this discussion.

THE COURT: All right.

MR. BRAFMAN: It's my understanding from looking at the revised witness list that Mr. Rosenfeld is not on the Government's witness list. He is the person from whom the arbitration issue arises. Mr. Rosenfeld was a consultant, got an agreement, sued on it, went to arbitration. The arbitrator ruled in his favor, and the Government's position is that the ruling by the arbitrator should not come in. If they don't call Rosenfeld, obviously, we won't refer to it unless we call him as a witness. And if we call him as a witness before we reach that issue, we'll give the Court a heads-up so that

Your Honor can determine how far we can go with Rosenfeld. Because he's a consultant who claimed he did consulting work and justified the payments he received and, indeed, was able to sustain his burden with the arbitrator.

And if the reason it still comes in for it is because Steven Aselage is a witness who the Government is calling, and he is the CEO for Retrophin. He was on the board during the period in question, and then he -- Steven Aselage testified under oath at the arbitration. So when Steven Aselage is cross-examined, it may be that some of the statements he made under oath at the arbitration are referred to, and I can stay away from, you know, Did the arbitrator believe you or rule in favor of Rosenfeld? We will not push the envelope. But I think it's fair game to cross-examine them if he gives inconsistent testimony in connection with this arbitration testimony.

So I don't think Your Honor needs to rule on the question of whether the arbitration decision will result -- comes in at this time. We will not open on it.

THE COURT: Okay. I have not even seen the decision. So before I were to rule on it, I think I would like to see the decision --

MR. BRAFMAN: Okay. But all I'm suggesting --

THE COURT: -- because I want to see whether it fits within --

MR. BRAFMAN: -- it may -- you have enough to do without creating work. And if we call him as a defense witness, we will alert the Court in advance, give you a copy of the decision, alert the Court that we intend to try to offer the decision of the arbitrator. Because if we don't, then Your Honor doesn't need to make that ruling. We will not open on the fact that there was a Rosenfeld arbitration where, what the Government characterizes as a sham consultant agreement, was found by the arbitrator to be a real consulting agreement.

THE COURT: Anything from the Government?

MS. KASULIS: Your Honor, the defense is correct, that we are not calling -- the Government is not calling Mr. Rosenfeld at trial. We're fine with Mr. Brafman's characterization as to how to proceed. If Mr. Aselage testified and -- during the cross-examination, if Mr. Brafman goes ahead and limits the way in which he characterizes the arbitration, et cetera, the Government is fine with that. I think that's entirely appropriate. So we're in agreement with Defense with respect to that motion in limine.

THE COURT: All right.

MS. KASULIS: And if anything changes throughout the course of the trial, we can obviously revisit the issue.

MR. BRAFMAN: Your Honor --

THE COURT: All right. Just so I am clear then, you

are not going to proffer the arbitration decision? You will not be talking about them in your opening statement?

MR. BRAFMAN: Correct.

MS. KASULIS: Correct.

THE COURT: And it will only, perhaps, become relevant if during the course of the testimony the arbitration decision is brought up?

MR. BRAFMAN: Well, I'm going a step further in that. During the cross-examination of Mr. Aselage, I may refer to his testimony at the arbitration so the jury may understand that there was an arbitration. But I will not reveal what the decision of the arbitrator was, which I think is the only objection the Government has. The fact that the arbitration comes out is because Mr. Aselage testified at the arbitration. If we call Rosenfeld as a defense witness, we will alert the Court and the Government and then we can discuss then if it will be appropriate for the jury to know what the arbitrator ruled.

MS. KASULIS: Your Honor, the one request the Government does have is if Mr. Brafman is to refer to the debt alternate proceeding, that to leave the jury with the idea that there was some sort of arbitration and then they don't have any sense of what that was about or what happened or any of those things, I think that it sort of leaves them with the question that we don't need to have them be left

with. That perhaps Mr. Brafman could refer that there was an alternate proceeding or another proceeding that Mr. Aselage testified in and then he can, of course, cross-examine him about that testimony?

MR. BRAFMAN: Your Honor --

MS. KASULIS: That would be the Government's suggestion with respect to that cross-examination.

MR. BRAFMAN: Your Honor, throughout the Government's memo we get to a couple of other points. What they're trying to do is essentially -- and I hate to use this term -- but suggest alternate facts as opposed to what actually happened. What actually happened is that Mr. Aselage was cross-examined and testified at an arbitration proceeding. And I think calling it what it is without revealing the outcome is not inappropriate. That's where he testified. It wasn't a preliminary hearing. It wasn't the Government's office. If he gave us 302, if we have a 302 we identified, you know, where it was that he testified. I don't want them to think there's another trial somewhere. I think the fact that it's a civil proceeding, well, I can say that. I can say it was a civil proceeding so that they don't speculate that there was another criminal trial that nobody knows about.

MS. KASULIS: Your Honor, I think characterizing it as a civil proceeding is acceptable to the Government.

THE COURT: All right.

MR. BRAFMAN: Okay.

THE COURT: Thank you.

MR. BRAFMAN: Your Honor, the Government has asked us -- we -- the Government has asked to be allowed to refer to Mr. Shkreli's experience at Elea Capital. We originally opposed that idea. We withdraw our opposition. We think Elea is relevant, certainly since they list Josiah Austin as one of the first Government witnesses they intend to call. So we don't have an objection to the Government making reference to Mr. Shkreli's performance at Elea Capital.

THE COURT: All right.

MR. BRAFMAN: We do object, however, on some combative issue. We do object to any reference to Mr. Shkreli's involvement for RBC Capital. Unlike Elea, which was used at times in conversations with potential investors, I'm not aware of any reference to RBC by Mr. Shkreli of any investor suggesting that they relied on his work at RBC to invest.

In addition, he's only there for several months. There would be a dispute as to the reasons he left. Mr. Shkreli's position is he left because he had made a commitment that if he was down 10 percent, he would leave. At the time he left, he was down 9 percent. And I think Mr. Abramson, if he would testify, would testify to matters which are not relevant because his performance at RBC was

never cited as a credential. And Mr. Abramson would testify that Shkreli left because he had violated RBC policy. And then we would then need to go into an entire discussion as to what the policies are, how they're enforced, how they are applied. And I think it's -- under 403 it has zero probative value other than the prejudice, because unlike Elea, he never touted his employment at RBC as a -- as a credit, if you will, or a credential that would cause someone to invest who might otherwise not have invested.

THE COURT: Does the Government want to be heard on that or could we agree -- could I have you agree?

MS. KASULIS: Your Honor, the Government would like to be heard just briefly because the Government's response as set forth in its papers is very clear in our discussions with the investors that Mr. Shkreli relied significantly on his prior alleged success in the financial industry in recruiting these investors into the funds. He starts with his, you know, background at Cramer Berkowitz and then touts his amazing performance record, all the way up until the point that he is recruiting these investors.

His failure at RBC Capital in a relativity short period of time, a two-to-three month period of time, Mr. Brafman's correct, he did have a 10 percent limit. He wasn't at -- they thought he was at 9 percent, and then when they confronted him about the 9 percent limit, he had actually

doubled, had gone way over his limit by almost double what he was allowed to trade. And he hid this fact that he had incurred those losses from RBC.

So we believe that this direct evidence, because it is -- is evidence that, obviously, shows that he was making a material misrep to the investors about how successful he, in fact, really was in the finance industry. And it shows alternately that there was not a mistake made by Mr. Shkreli when he hid his significant losses from the investors throughout the performance of both funds. So we believe that this is direct evidence, and it goes directly to what the Government must prove as part of this trial, that Mr. Shkreli made material misrepresentations to the investors. And alternately, we believe that there is a pursuant to Rule 404(b) that this evidence would be admissible.

MR. BRAFMAN: Your Honor, on balance, if you look at a Wall Street trader's performance over a very brief period of time, you know Wall Street provides wild swings for even the best of traders. So to the extent that you're there for a couple of months and you're down more than you're supposed to be down and you remove yourself from there, I'm not certain that that's something that anyone would either rely on or not rely on because it's for a three-month period of time. He doesn't use it. He doesn't use it as he does use Elea and as he does use MSMB.

So to the extent that their position is Elea Capital is relevant, we withdrew our -- our argument, and it's going to come in through the testimony of a witness. There's no witness to my knowledge, unless I've missed something, who says Mr. Shkreli said something about RBC, the good or the bad. And the problem we have is this is a policy that he violated at RBC, and to the extent that you now got into what is the -- what are the rules of an individual trading firm, it's not as if what he did there was illegal. He wasn't charged with a crime. What he did was in violation of company policy, and I think it's probative of nothing and the prejudice is substantially outweighed -- outweighs the limited probative value.

THE COURT: All right. Thank you.

MR. BRAFMAN: Your Honor, if I may move on to another issue?

THE COURT: Yes.

MR. BRAFMAN: There is an issue with respect to -- should I move on, Judge?

THE COURT: Pardon me?

MR. BRAFMAN: May I move on?

THE COURT: Of course.

MR. BRAFMAN: Okay. There is an issue with respect to the investor who was identified as Mr. Tim Pierotti.

THE COURT: Yes.

MR. BRAFMAN: And here is the issue in a nutshell: The Government will call Mr. Pierotti and in substance what they said in their papers as Mr. Pierotti is one of a group of people who received shares of Retrophin stock in a way that suggests that Mr. Shkreli was trying to control these people in terms of what they could or could not do with the shares. And to the extent that that's relevant to Count 10, the Fearnow count, they can obviously have Mr. Pierotti testify to this. Mr. Pierotti violated his understanding with Mr. Shkreli. He ends up quitting the job; never coming back to work, at least at the initial part; and he ends up selling the shares; and Mr. Shkreli is obviously upset.

I think the story that they need to tell is that -- that this witness who is going to be classified, I guess, as a nominee for the purposes of this discussion had an understanding with Mr. Shkreli that he was going to be given these shares with the understanding that he would not do anything with them, and that Mr. Shkreli was in control of those shares. That's what they need to establish with respect to the Fearnow shares.

Mr. Shkreli is so enraged, if you will, as a result of this Pierotti violating the terms of their understanding, that he loses it at some point. And if you look at the -- if you look at the Government's memo, he writes a terrible letter to the family. It's after the fact. It has nothing to do

with the violation of the agreement. It just shows that Mr. Shkreli is, you know, a little bit unhinged when it comes to that issue, and he does something which is, obviously, inappropriate. But it has nothing -- no bearing on whether or not there was an understanding.

THE COURT: But isn't he still at the time engaging this behavior attempting to gain control or regain control of the Mr. Pierotti's Fearnow shares?

MR. BRAFMAN: Yes, but he sues them also. So there's no --

THE COURT: Right. But --

MR. BRAFMAN: No, but Judge -- Judge -- Judge, attempting to get control back by harassing the family is not relevant to whether or not the original issue was whether Mr. Pierotti was going to -- was going to agree to the terms that Mr. Shkreli has agreed to. He can testify to this. If on the cross-examination of Mr. Pierotti we open a door that suggests that there is a reason why the threat should come in -- and I will -- I will tell you that the threats and the misbehaviors are more than a year after the shares are -- are given to him. And the quote they have from this blog is in 2015, which is several years after it where he talks to a reporter and he makes some reference to -- to the -- to Pierotti, and I'm going to have a little bit of the Bobby Shmurda in me.

I think that's under 403, simply not appropriate for a -- in a case where the issue is whether or not Mr. Shkreli gave those shares to the Fearnow recipients with the understanding that he was still in control of those shares. Mr. Shkreli makes that absolutely clear initially with the discussion with Mr. Pierotti. Mr. Pierotti can testify to the original understanding. And to the extent that on cross-examination we suggest that Mr. Pierotti was a liar, and if they -- this opens the door to these threats, well, maybe then you revisit it. But to put it on the direct case is just inflammatory, and it, quite frankly, just adds nothing to the proof as Mr. Shkreli's belief that Mr. Pierotti violated the terms of the agreement. That's clear in the lawsuit that he files against him, and it's going to be clear from the conversation that Mr. Pierotti will testify to about Mr. Shkreli.

The rest of this stuff is -- is inappropriate, perhaps, and maybe is -- is regrettable, but I don't think it's relevant on the narrow issue that the Government is trying to prove with respect to the Fearnow shares understanding.

THE COURT: All right.

Does the Government want to be heard?

MS. KASULIS: Just briefly, Your Honor. This is in Count 8 that this evidence goes directly to, and it

is absolutely direct evidence of Mr. Shkreli's intent to control these shares. When Mr. Pierotti disobeyed Mr. Shkreli's instruction with respect to the Fearnow shares, it wasn't that he was just upset. He did things to Mr. Pierotti to try to get control of those shares back, and one of those is a letter that he wrote to Mr. Pierotti's wife, that was not a year later. That was in January of 2013, right on the heels of Mr. Pierotti selling those shares. And so it is absolutely part of the story. It completes the story. You know, we intend to have Mr. Pierotti elicit testimony about it. They will certainly have the ability to cross-examine him about it. But it is absolutely relevant and direct evidence to what the Government needs to prove with respect to the defendant's intent in Count 8; and therefore, we believe it's admissible.

MR. BRAFMAN: Your Honor, if the defendant by my argument is -- as a practical -- as a practical matter telling you, Judge, that the issue with Mr. Pierotti and whether or not Mr. Shkreli was upset with him about violating the terms of the agreement, we may choose not to challenge that part of his testimony, and then you don't get to the threats. The threats are only important if with respect to -- of Count 8 when Mr. Pierotti testifies. We suggest that this wasn't the understanding by Mr. Shkreli.

At the end of the day, given the rest of this case,

I think what you're doing is you're throwing a hand grenade into what is otherwise a white-collar criminal case where there are very, I think, appropriate legal defenses to certain counts and various esoteric defenses as to other counts. But at --

THE COURT: But it's gutting on material -- I mean, it seems to me that you're asking me to preclude the Government from offering evidence that is directly relevant to their proof that Mr. Shkreli was motivated by the desire to control those shares?

MR. BRAFMAN: Correct.

THE COURT: And that he wanted to control those shares, and in order to maintain control or regain control, and this is evidence of the act.

MR. BRAFMAN: Sending a letter to the defendant's wife saying your husband stole from me and we're going to render you homeless, I don't think you need to go there in a case where the witness is going to testify to the understanding. The understanding is whether or not these are shares that Mr. Shkreli intended to control. To the extent that we may not challenge that testimony, I'm not certain you need to inflame the passions of the jury with respect to that count. So I ask you to let them not open on it. Let them not put it in the direct of Mr. Pierotti and -- and see where we go on cross. And if we look -- get that door slammed in our

face, obviously, you can make a ruling at that time.

MS. KASULIS: Your Honor, with respect to this issue, the Government does cite to Old Chief that the Government --

MR. BRAFMAN: I'm sorry?

THE COURT: Old Chief.

MS. KASULIS: Old Chief, the case that, of course, allows the Government to put in evidence of what, in fact, transpired.

And just because, you know, maybe Mr. Shkreli would like to take these statements back, he said them and he said things that are directly relevant to his intent to Mr. Pierotti's wife. He stated, Your husband has stolen $1.6 million from me and I will get it back. I will go to any lengths necessary to get it back. And that is directly in reference to the shares that we have charged under the subject of Count 8. And while perhaps Mr. Shkreli, you know, believes that this is prejudicial, it is not unduly prejudicial, it is not unfairly prejudicial, it is what he, in fact, said to Mr. Pierotti in response to Mr. Pierotti's action. And that's why the Government believes that it should be admissible and that Mr. Pierotti should be allowed to testify about it.

THE COURT: All right.

MR. BRAFMAN: Should we move on, Your Honor?

THE COURT: Yes.

MR. BRAFMAN: Okay. Your Honor, I hope -- I hope the Government has listened carefully to the things that they just said because they have tried in their brief, on the other hand to preclude us from putting in good things about Mr. Pierotti. And I think whether he testifies or not is a decision we will make later on. And if he testifies, obviously, it's different. But I alert the Court to the fact that I want to make certain that we're not violating your ruling.

That, for example, with respect to Mr. Blanton's testimony, there is a lot of conversation with Mr. Blanton at the time he becomes an investor about Mr. Shkreli's moving efforts on behalf of a young child who was a friend of Mr. Blanton, Josh Fraise, who is suffering from a debilitating childhood illness that Mr. Shkreli ultimately uses as the impetus to form Retrophin to try and find cures for these diseases. So to the extent that that's all part of the narrative, I believe that we're going to be able to question Mr. Blanton about the phone conversations he had with Mr. Shkreli that caused, not only Mr. Blanton to invest in Retrophin, but when he was alerted the day of the failed Orex trade, counseled Mr. Shkreli that Jesus was going to save him and he should work under Retrophin. So I think at the end of the day, they take the good with the bad. If they want to put in the bad with respect to the Retrophin conversation with Pierotti, I just

looked at their brief and they said we should not be able to put in, you know, the evidence of good things that Mr. Shkreli has done.

I understand we're not -- we're not putting in his prior history unless he takes the stand. I understand that. But -- but to the extent that these are all part of the conversations with respect to the investors, I'm assuming that the Government was not seeking to preclude us from using that information.

THE COURT: Do you mean you are claiming that this particular drug and its affect on this child was a key or material fact in inducing at least one investor?

MR. BRAFMAN: A key investor, Mr. Darren Blanton, has confirmed that in his statements to the FBI that the Fraise family was introduced to Mr. Shkreli. Mr. Shkreli developed a strong relationship with their son who was dying, who did die, and the attachment caused Mr. Shkreli to devote an incredible amount of effort and time to creating Retrophin for the purpose of developing orphan drugs among the orphan drug -- drugs that could possibly be secured for this type of disease. And that, I think, is not in dispute. I think Mr. Blanton will acknowledge it.

THE COURT: All right. Well, you know, I guess my question is: You want this to be admitted because you want to show why people would be inclined to invest with your client,

Mr. Shkreli?

MR. BRAFMAN: It -- it's not enough for the Government to say that I represented -- misrepresented my background as an investor; and therefore, someone like Darren Blanton, who runs $175 million -- $100 million fund, and is a very wealthy man, gave him a lot of money. Gave him a lot of money, and I think people will find -- he will acknowledge that he had faith in Martin Shkreli, the boy genius, not necessarily just because of what he said.

Now, when Mr. Blanton changes his tune later on in some of his later 302's, we can visit that on cross-examination. But I believe that if you are investing with someone because you believe that this person has a great potential, and, in fact, you're then made not only whole -- and we'll cover that in a moment -- but you get four times your investment when Retrophin becomes public. This is a man who believes in Martin Shkreli as a scientist, not just as an investment advisor.

THE COURT: All right.

All right. Does the Government want to be heard?

MR. SRINIVASAN: Yes, just briefly, Your Honor.

It looks like we have resolved most of the issues in connection with this motion. I think our concern was that, you know, in addition to what the discussions were between Mr. Shkreli and the investors, there may be evidence of

depictions of some very devastated diseases, you know, sort of a side trial as to, you know, the science of myotubular myopathy or muscular -- muscular dystrophy. I'm not -- I'm not saying that from Mr. Brafman's side -- I don't think that we have much of a dispute at this point that --

THE COURT: Well, are you planning to present such evidence, Mr. Brafman?

MR. BRAFMAN: Not through the witness, Blanton. If Mr. Shkreli testifies, his entire effort on behalf of Retrophin is relevant because many of the investors who allowed their money to go from MSMB into Retrophin once they were advised that the money was lost in MSMB, many of them used words like, We were betting on the genius, not on the -- his investment savvy. And all of those who did invest with him made out like a bandit, quite frankly, because he was ultimately very, very successful. But the point is, I don't intend to do a slide slow on -- on the science. If Mr. Shkreli testifies I think what he was working on, how hard he worked on it, why he felt he would be successful, I think is relevant to his state of mind, and whether or not he intended to defraud these people and whether or not he blew their money on a trade, which is often what happens in a -- when you're shorting stock, and then worked tirelessly for years and years to make his promises good. So I don't intend to do a slide show on the actual science.

MR. SRINIVASAN: Your Honor, just one final point. I think as we set forth in our brief in one of the footnotes, to the extent that Mr. Shkreli takes the stand and portrays himself as altruistic and is concerned primarily about patient care, that may potentially open the door to a host of other evidence regarding other motivations he may have had and other conduct he may have engaged in that may not necessarily come in in the Government's case in chief. And so I think that attacks the --

THE COURT: Have you already talked to Mr. Brafman about what that evidence will be if --

MR. BRAFMAN: We understand that.

THE COURT: Okay.

MR. BRAFMAN: We understand that.

THE COURT: All right. I just want to make sure there are no surprises that could cause a delay?

MR. BRAFMAN: No, we understand that.

THE COURT: Okay.

MR. SRINIVASAN: Yes, Your Honor.

THE COURT: All right.

Let me see... Was there anything else that was at issue? The lack of criminal history, is that going to be an issue still?

MR. BRAFMAN: It's not an issue on direct unless he testifies.

THE COURT: All right.

MR. BRAFMAN: And then if he testifies, then I think it is relevant.

THE COURT: All right.

Okay. What about in the event Mr. Shkreli, if he is convicted or acquitted, his post-trial plans?

MR. BRAFMAN: I'm sorry?

THE COURT: His post-trial plan?

MR. BRAFMAN: Well, I'm not --

THE COURT: I am just concerned about that category of evidence.

MR. BRAFMAN: I understand that. And it is not my intension to convey to the jury that they should acquit him because this is the line that they want -- may cure very devastating diseases. If he testifies and he discusses his work at Retrophin and his continuing work at Turing, I think that's appropriate because that's his employment. And that is all during the period charged because when Mr. Aselage decides to take his company, he goes out and starts Turing during the very same time period. So it's not as if after Retrophin is taken from him that he is just sitting in the street doing nothing. I think it completes who he is and what he is doing.

I understand what Your Honor doesn't want me to do, which is open to say words to the effect that I said during one of our oral arguments, I understand that. That's --

that's not what we intend. But if he does testify, I don't think the future is appropriate for speculation, but I think what he did during the period covered by the indictment is very relevant to who Martin Shkreli is and how hard he's been working as opposed to, well, many Defendants who have done nothing worthwhile in their life.

THE COURT: All right. Thanks.

Does the Government need to heard on that topic?

MR. SRINIVASAN: Nothing further, Your Honor.

THE COURT: All right. Is there anything that I have -- anything else that the parties want to address at this time?

MS. KASULIS: Your Honor, I think what they're -- I'm counting two additional motions --

THE COURT: Yes.

MS. KASULIS: -- that we haven't addressed.

I think with respect to the Government's motion for prosecution on this idea of Shkreli --

MR. BRAFMAN: I'll make that easy. Our position is that Retrophin has a motive to file a $65 million lawsuit, and I think that's fair game. We do not intend to say that you're -- the Government is doing anything wrong by prosecuting this case.

THE COURT: Well, does that modify you, or did you want to also preclude -- are you seeking to preclude evidence

that there is a lawsuit out there?

MR. BRAFMAN: Well, it goes to motive and bias by Retrophin. You can't preclude that.

MS. KASULIS: Well, I think that, Your Honor --

THE COURT: Well, is Retrophin --

MS. KASULIS: Your Honor, I think that some of the board members --

MR. BRAFMAN: I'm sorry?

MS. KASULIS: Some of the board members who we intend to call as witnesses for Retrophin may have some knowledge regarding that, and there may been an opportunity for cross-examination for -- with respect to bias, and so we believe that would be an appropriate avenue of cross-examination but not to sort of get into, of course, a trial within a trial about this alternate civil proceeding and Retrophin bringing charges and things along those lines.

MR. BRAFMAN: No. But I do think -- I -- I agree. I -- I'm -- I'm representing that we're not making the Government the bad people in this case. But I do think there is a motive that will become crystal clear when people like Aselage testify, that he took over this company, got rid of Martin Shkreli, and is now running a company that is worth $100 million based on Martin's genius. And I think Retrophin suing Martin for $65 million is relevant because some of the same board members are the people who the Government is going

to call to testify as to the period of time when Martin was in Retrophin. So I hear the distinction between lumping the Government in with Retrophin, and I am not going to do that. But Retrophin is fair game, I believe.

THE COURT: What about the Government's motion to preclude evidence of ultimate harm or ultimate benefit, are you going to be standing down on that?

MR. AGNIFILO: No, Judge. I -- I think -- my reasoning of the case is in this area, and -- and -- and we can get to the -- we can get to this -- we can get to this at a later time.

THE COURT: Well, no, we should get to it now.

MR. AGNIFILO: No, that's fine.

So the Judge's-- first of all, the Judges's -- the Government proposed charge is -- is not an accurate statement of the law and it's not the charge that was given in Finazzo, and it's not the charge that was given in Barkovich. It -- they -- they leave out a critical phrase, which makes all the difference which is for the purpose of causing loss which is not in the charge. I don't know how it fell out, but it fell out.

My reading of the law starting with U.S. versus Rossomando is -- is that -- in Rossomando, as Your Honor I'm sure knows, the conviction was -- was overturned by the Second Circuit, and the Second Circuit in Rossomando expressed

great concern that the charge, the so-called no ultimate harm charge is -- is contradictory to other established charges, including the good faith charge and other charges.

And what the cases all said -- and by "all," I mean Rossomando and Barkovich and Lange and Finazzo is that you need a factual predicate. You need a sufficient, factual predicate in the evidence to justify the charge. In Rossomando there was no sufficient factual predicate, and that's why the charge is errant. And so until we know what the evidence is and we don't know what the evidence is, I don't think we have -- we should -- we should have this discussion about the no ultimate harm charge. And I think if we have the discussion now in the absence of the evidence, we're essentially violating the Court's hold in Rossomando, which -- which talks about a sufficient factual predicate for the charge.

Here there's been no evidence. And one of the distinctions is that I think the Government is -- is going to contend, I suppose, that Martin Shkreli committed -- made misrepresentations or omissions with an eye toward losing people's money in the short term but not in the long term. That hasn't been proven yet. It might never be proven. If it's not proven, then my contention, my argument is that Rossomando is not allowed to charge. And so until all of the evidence is in, when we have a -- a meeting about the jury

charge after the evidence is in, then we can see if the evidence in the case justifies the no ultimate harm charge, because it may very well not.

And if we're going to be true to the decision in Rossomando -- and there's no indication that Rossomando is not good Second Circuit law. It's never been overturned. Finazzo, in my opinion, which is at least last I checked, was an unpublished decision, was not as clear about the requirement of a career factual predicate. But if you look at cases like Dinome and Rossomando and Barkovich and Lange, they all talk about a sufficient factual predicate. And Rossomando says if you don't have a sufficient factual predicate, you don't get the charge because the charge is misleading and the charge is contradictory. So at this point without any evidence in the case, I don't think we can have the discussion.

Because essentially what the Government's trying to do, I contend, is essential go and putting -- putting the -- the horse before the cart. And what they're basically saying is, We don't want this evidence to come in -- or the cart before the horse -- the horse is supposed to go before the cart. I was born in the Bronx. We don't have carts or a horse, so...

So what they're trying to say is, Well, because we think there's going to be a no ultimate harm charge, we want

to sort of limit the type of evidence that comes in. But it doesn't goes that way. It goes that we have a trial based on relevant evidence.

The evidence comes in, and then when we look at that evidence, we see if there's a sufficient factual predicate for the no ultimate harm change, and we have that discussion at that point. We're all alerted to the issue. We are alerted to the issue, they're alerted to the issue. And I don't -- I don't -- I don't -- I'm not critical of them by their jury instruction. It's early in the case. This is why we have draft instructions and we go through them, and we'll have a chance to go through them at the right time and get the language that's appropriate.

One of the things that I'll also note having read all of these cases, very often I have found there's not an objection to the jury charge. I think the no ultimate harm charge kind of came of age in a series of trials when there were no sufficient objections to the charge, and so a lot of times it's being reviewed by the Second Circuit on a sort of clearly erroneous standard. I mean, here, obviously, we are all very hip to the issues, so we're not going to have that problem here. We've already not had that problem here. So my suggestions for the time being is we know it's there. There's going to be very enlightened, educated discussion one day about whether the facts of the case justify the no ultimate

harm charge. But since the cases do talk about a factual predicate and the trial hasn't started, I think it's fine to talk about it in theory, but I don't think we can answer the questions at this point.

THE COURT: Does the Government have a different view?

MS. KASULIS: Your Honor, I think, you know, we made this motion because we've been hearing the drum being beaten throughout all of our proceedings up until this point about sort of the no ultimate harm no harm, no foul idea. And so we raised this motion in part to put everyone on notice that the law is very clear, that no ultimate harm is no defense.

And you know, I think what the defense did not address is this issue of, you know, investors' right to control their assets. You know, that -- that you -- the fraud is committed at the time that you make those misreps and omissions because you were depriving them of the right to control their assets both to make investments elsewhere, for example, or while these funds are performing, that they have a right to decide whether or not to pull their money out of the fund, depending on how the fund is, in fact, performing.

So this idea of, Oh, well, you know, we're just going to make them whole a couple of years from now. So what are we doing here? I think that's the defense that we are very concerned about. You know, that our concern is that a

limine instruction is pages and pages and pages or a jury instruction is pages of jury instructions that comes, you know, five weeks after the start of trial is not sufficient to address this issue and to address the prejudice that the Government will experience if this defense, which there's no basis in law for, is allowed to be raised over and over and over again. And so, you know, the Government is fine with waiting to see how the evidence develops. You know, I assume that there will be no argument that the facts are on opening. That's what I'm hearing the defense, at least. And so we're happy to revisit the issue as if and as it arises. But this is something that, obviously, we're very concerned about. And we will continue to raise it as an issue and as a concern as -- as the trial develops.

THE COURT: Well, is the defendant -- defense planning to address that in their opening or in their cross-examination, for example, of an investor to say to that investor, Look, you actually made money or you made more than you thought, or you didn't really lose money; is that going to be coming up?

MR. BRAFMAN: I don't have to use the words no ultimate harm in my opening statements. But the fact is this is a very unusual case. I've never seen a fraud case like this. And what the Government has done is they've taken -- they've sanitized a meiotic view of the relationship between

Martin Shkreli and the investors and essentially used their view to essentially determine whether Mr. Shkreli intended to defraud these people. And if he says something on Monday that they say is not completely accurate, then boom, the fraud is committed and you're guilty and you go straight to jail. I don't think that that's the relationship that many of the investors feel.

There was a period of time when they were relating to each other and back and forth, and several of the investors were happy continuing into Retrophin. Some were not. And I think at the end of the day, I think it is relevant whether or not they did, in fact, receive money back because if, in fact, they agreed to go into Retrophin because that was the way they would get their money back, I'm not certain those people are victims of a fraud. So I think on a case-by-case basis some of these investors will say that they understood that MSMB did not work out.

They're sophisticated people. This was a hedge fund. I think the Government's view of what a hedge fund is and is not allowed to do with money on deposit is some -- to some degrees is based on a degree of naivete, and some of the investors in this case have a degree of sophistication that far exceeds that of Mr. Shkreli. So if you're asking me, do I ever -- or can I promise you that I am not going to ask an investor like Al Geller or -- or Steve -- Darren Blanton or -- or Richardson

whether or not they had an ongoing communication relationship with Mr. Shkreli in which implicitly they understood that the money is being moved to Retrophin, and did you ultimately get it back from Retrophin? Everybody got paid back in this case, to my knowledge. And everybody got back -- got paid back with either cash or shares of Retrophin.

The issue is did they get back -- paid back immediately? No. Does that mean you're guilty of fraud? I don't think so in every case. And I think until Your Honor actually hears the facts, a ruling that the no ultimate -- that the ultimate fraud is -- is ironclad bar to a defense of fraud, I just think is an incorrect statement on the law.

THE COURT: Do you disagree, though, with the Government's contention that the Second Circuit looked at the immediate harm that comes from denying an investor the right to control or decimate their assets?

MR. BRAFMAN: I agreement to the extent that the facts of this case become -- become such that that is the charge that Your Honor agrees to give. But I'm not certain that we get to that point. I read the cases that Mr. Agnifilo has read, and to be honest with you, I think bad law was made by lawyers who, quite frankly, chose not to object on something they should have objected to, with all due respect to that group of people.

However, this case is fact specific, and I think the

cases in which the Second Circuit made that decision were each factually, in my opinion and our opinion, distinguishable from what you're going to hear in this case. So I think they asked Your Honor to preclude the argument in advance of trial, and if Your Honor gives the charge and if we have argued all through the trial in a manner that undermines our defense when Your Honor gives the charge, I think we have to live with that at that point. But I think for the Government to say, Well, you cross-examined these people, you can't bring out the fact that they were made whole because it doesn't matter, is just cleaning up the case and making it what it's not.

I think the relationship between an investor and his -- and his hedge fund person, if you will, or investment vehicle has to be fleshed out, and then the jury can decide when Your Honor appropriately guides them as to whether or not they were defrauded the moment they give him money, if they did it based on factors that were a misrepresentation.

I'm not asking for a jury nullification because all of the investors made money. That's what the Government seems to be petrified about, because the facts of this case are that this defendant, whatever else he did wrong, ultimately made them whole. And I understand that that would be something the Government would love to keep out of the case, but it's the case. It's part of the case. And each investor was made whole at a different time and a manner through negotiations,

sometimes represented by their own lawyers. And if -- if the Government's position is, you know, on Day One when Martin Shkreli told you he had a great record, and therefore you invested, he's guilty of fraud, I don't think that that's the case in this case, and I don't think that that's the law either.

I understand what the Second Circuit has said, that if you deprive someone of the use of their money by fraud, but he still has to intend to defraud. And I think the issue of loss is alive in a case where the Government is going to argue a fraud based on his actions, and I think this is just too complicated for you to sort out without hearing the evidence, because they're giving you, I think, a sanitized version of the relationship between these parties.

And now having seen the 3500 material, we're speaking with much more factual understanding of what these people are saying, and it's kind of interesting that just as an aside, that the -- the story develops. The first 302 is almost grading material, which we never got. The second 302 is devastating. And the third 302 is, You're getting a nonprosecution agreement. So I think there is a lot going on that the jury needs to hear.

THE COURT: Okay. Anything else the Government wants to add?

MS. KASULIS: Your Honor, I think it's clear that

the Court understands the Government's concern. We're not making the argument that the witnesses cannot be -- cannot testify about whether they regained any of their investment. In fact, it's our position that they were paid from stolen money. I mean, that's, in fact, part of the charges in this case. So obviously, that testimony was irrelevant.

But what is clear is good faith is about believing, you know, the representations that you make, and if you are lying, if you know you are lying and you are using those lies to take people's money and you are depriving them of their right to choose how to use their own money based on your lies, that is the law. That is a fraud under the law. And that is what, you know, we intend to prove at trial. That is the issue.

And, you know, it's not about this -- the Government's issue or what the Government wants everyone to hear. What the Government wants to do is enforce the law. So there is law here. There are rules that apply to Mr. Shkreli. They apply to everyone in this courtroom, and that's what we are trying to enforce. And any argument that are made that were contrary, knowingly contrary to laws, they're inappropriate and they should not be before the jury. And that's what the Government is trying to prove here, Your Honor.

MR. BRAFMAN: Can I just say one thing?

THE COURT: Yes.

MR. BRAFMAN: And I'm glad -- I'm glad I was just reminded. The Count 7, which charges the Retrophin fraud makes it impossible to have this trial completed without the testimony, even on the direct evidence, that these people were already paid, because as she correctly points out, the people who were at times repaid with Retrophin stock and the theory supporting Count 7 is that this was the Retrophin fraud, that he paid MSMB debts with Retrophin money. So the fact that the witnesses got their money back is going to be in the case whether I put it in or not, but they can't try Count 7. And the issue of whether or not the Retrophin fraud was, in fact, a fraud is obviously in many ways different from Counts 1 through 6.

So the stuff all comes in, to be honest with you. And what we ultimately argue, they can argue to the Court and if they convince you to give that charge, they can then argue to the jury and the jury, if they follow your instructions and believe the Government's argument, will -- will convict Mr. Shkreli. I think what we have a right to do, to be -- to be candid, is still deal with his state of mind and his intent. And if the Court's Charge cuts the leg out from under that argument, then we will obviously have to address that at the end of trial.

THE COURT: All right. Thank you.

Is there anything else that I have overlooked?

MR. BRAFMAN: I don't think so.

THE COURT: Or anything else --

MR. BRAFMAN: Not from the defense.

THE COURT: -- that any party wants to argue?

MS. KASULIS: No, Your Honor. I think that's everything.

We did speak with the Court's deputy about we did provide our exhibits and our 3500 material, two copy sets. We're going to bring them just directly to chambers --

THE COURT: Okay. Thank you.

MS. SMITH: -- because they are voluminous. So we will just go ahead and do that, but I just wanted to make sure that was clear for the record, that we did provide that to the Court today.

MR. BRAFMAN: And -- and with respect to ours, we did give your deputy a -- a -- this and the exhibit list. The binders for the Court, were -- there are two sets. There are 14 binders in each set. So they are being finally collated as we speak, and we hope to get you them at the latest tomorrow morning.

THE COURT: That's fine.

MR. BRAFMAN: I apologize for missing today, but --

THE COURT: No, that's fine.

MR. BRAFMAN: -- they worked all weekend on it.

THE COURT: So we will have it --
MR. BRAFMAN: Before the end --
THE COURT: -- before the end --
MR. BRAFMAN: -- of the day tomorrow.
THE COURT: Thank you.
We will be issuing a decision this week. I appreciate the arguments. They have been helpful.
MR. BRAFMAN: And -- and the next time we appear is Monday at 9:00 a.m.?
THE COURT: Monday at 9:00 a.m.
I am currently planning to do it here. I will want to think about whether -- and we will give you notification whether we shift to the ceremonial courtroom. I just want to make sure I can sit everyone here.
MR. BRAFMAN: Yes, ma'am.
MS. KASULIS: So we'll await confirmation from the Court, or if we don't --
THE COURT: Yes. It's going to be here, unless advised otherwise.
MR. BRAFMAN: Well, the trial will be here regardless of whether the jury selection is --
THE COURT: Yes.
MR. BRAFMAN: -- yes?
THE COURT: Correct.
MR. BRAFMAN: Thank you.

THE COURT: And I am hoping we can start openings on Monday. I am hoping we can select a jury in the morning.

MS. KASULIS: And we will be ready for that, Your Honor.

THE COURT: Okay.

MS. KASULIS: Thank you, Judge.

THE COURT: Thank you.

And will you please kindly just let each other know about your lineup of witnesses so that we can plan adequately and have our smooth presentations?

MS. KASULIS: Yes, Your Honor. We did already provide the defense with our anticipated witness list for the first week. They are subject to change depending on travel issues and things along those lines, but this is what we anticipate at this time.

THE COURT: Okay. Thank you.

MR. BRAFMAN: Let me just add, we don't necessarily care about the order, but if people are added to that list because someone on the list can't make it, we would like to know.

MS. KASULIS: Absolutely. We will let you know as soon as we know.

THE COURT: All right. Thank you.

(Whereupon, the matter was concluded.)